

The institutional functioning of the EU

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EU Law Foundations



The Institutional Functioning of the EU

2011-2012 Volume II

Maastricht Centre for European Law

Faculty of Law

Maastricht University

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Volume II 2011-2012

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In 2010 the Education, Audiovisual and Culture Executive Agency (EACEA) awarded financial support to this course in the form of a Jean Monnet European Module (Lifelong Learning Programme). The Jean Monnet grant enabled us inter alia to organize each year a Student Conference. On 9 December 2010 we organized the first conference. The sixteen best papers presented by students during this conference were published in *EU Law Foundations – The Institutional Functioning of the European Union – 2010-2011 Volume I*. This volume is available in hardcopy as well in its soft copy version on the website of the Maastricht Centre for European Law (MCEL).¹

The second conference was held on 8 December 2011. Each of the 180 students participating in the course was given the opportunity to either present a paper or act as a discussant of other students’ papers in workshops composed of 40-45 participants. The quality of the presentations and discussions, in which also staff members of our Faculty participated, was high and led to often lively and heated debates on issues involving the institutional functioning of the European Union. The nineteen best papers are collected in this special volume.

The Conference was closed by a keynote address delivered by Kieran Bradley, Judge at the EU Civil Service Tribunal and Former Director in the Legal Service of the European Parliament, entitled “Thirty Years of Community Law”. We are grateful for his inspiring presentation, the written version of which is included in this volume as a Special Contribution.

In addition to Judge Bradley, we are indebted to Adeline Bruyere, Monica Claes, Lydie Coenegrachts, Florin Coman-Kund, Marc Dawson, Aalt Willem Heringa, Suzanne Jongste, Elise Muir, Andrea Ott, Nikos Skoutaris, Maartje de Visser and Antonia Waltermann for their various contributions. Last but not least, we would like to express our sincere gratitude to EACEA for the financial support received without which it would have been impossible to make the course as interesting and successful as it was.

Anne Pieter van der Mei and Ellen Vos

¹ <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForEuropeanLaw.htm>.

SPECIAL CONTRIBUTION

THIRTY YEARS OF COMMUNITY LAW

*Kieran St C Bradley*¹

When the organisers invited me to today's event, they suggested that my presentation be entitled "The European Court of Justice – a View from the Inside". It is a great title, but it rather gives the idea that I would be revealing the darkest secrets of the Court in Luxembourg. However, apart from the duty of discretion which comes with the job, my two months in office have not given me access to too many "dark secrets", presuming for the sake of argument, of course, that there are any.

The title of my talk is taken instead from the very fine volume of that name, published by the Office of Official Publications in all then seven Community languages in 1982, celebrating the first three decades of Community law. Its subject is essentially an overview of my own career in European Community, latterly Union, law, highlighting some of the developments in the institutional law, particularly Court cases, which have occurred during the second three decades of European Community, now Union, law.

I.

I have in effect had four different careers in European law, two at the European Parliament, two at the Court of Justice, and I would like to say a few words about each. But before I do, I want to bring you back briefly to the early 1980s, to an epoch before email and social networking, before smartphones and Smart cars, when Germany, and indeed Europe, was still divided into two blocs of States following divergent, not to say mutually hostile, political ideologies. Thirty years ago, as Susan Vega put it in another context, was like the World before Columbus; the Earth was flat, in the sense that the Community was doing much the same things in much the same way as it had done for the previous thirty, with not much change in immediate prospect.

Yes, there were a few hills and valleys, and even a few legal constructions, on the horizon. The Community had overcome its first major political crisis in 1965-1966, at the cost of all but abandoning majority voting in the Council as the norm for decision-making, which had been one of the most innovative features of the Communities' original institutional structures. It had too opened its arms to Denmark, Ireland and the United Kingdom in 1973, and on 1 January 1981, to Greece. The Court of Justice had by then established the so-called pillars of the new European legal order, direct effect and primacy, and used them to build the four freedoms of the then common market.

The scope of the Community's activities was nonetheless very much narrower than that of the Union today. Apart from establishing the objectives of the free movement of persons, goods, services and capital, the EEC Treaty had only provided for a handful of common policies, in respect of external trade, agriculture and transport, and of those, only the agricultural policy could be said to be fully operational within the Community. There was an embryonic regional policy, an embryonic social policy, an embryonic development policy, and an environmental policy which could barely aspire to being embryonic. In practice, this latter was limited to a

¹ Judge at the European Union Civil Service Tribunal. This is the written version of the keynote address that Judge Bradley delivered at EU Foundations Student Conference on 8 December 2011. Judge Bradley spoke in his personal capacity.

directive on the protection of wild birds and a few directives harmonising Member States standards for clear air and clean water.

No foreign policy. No area of freedom, security and justice. No Euro. No European Union citizenship, no cultural or industrial policy, no youth or education policies, though a few years later the Community did come up with the first Erasmus scheme, which has proven to be a fairly spectacular success.

The institutional landscape was pretty bare compared to what we know now. True, the big four were already there: Parliament, the Council, the Commission and the Court, while the European Council though already extant was outside Community institutional framework and changed its part-time President every six months. There was no European Central Bank, no High Representative for Foreign Affairs, no Ombudsman, no Committee of the Regions and the Court of Auditors, only a few years old, had not yet been promoted to the rank of 'institution'. The European Parliament had just been directly elected for the first time and was still finding its feet in the decision-making process, or rather finding that on many matters it didn't have a leg to stand on when it came to influencing policy decisively. There was also almost no institutional case-law to speak of, other than a handful of exotic judgments on the delegation of implementing powers, such as *Meroni* and *Köster*, and another handful on the proper conduct of consultation, the only legislative procedure then provided for.

The decision-making process of the Community was thus very different. In those days, as the saying went, the Commission proposed, the Council disposed, without co-decision on legislation or a right of parliamentary veto on international agreements. Parliament enjoyed some budgetary leverage though the lion's share of annual budgetary expenditure was taken up by agricultural spending over which Parliament's influence was somewhat limited.

In theory, the national parliaments could have participated in the policy process, at least indirectly by seeking to influence the Council, particularly where the national governments enjoyed a veto power. For the most part they did not, with the notable exceptions of the Danish *Folketing* (which called their ministers in for a briefing before every Council meeting) and the Westminster Parliament, each House of which scrutinised Commission proposals more or less closely, and questioned their ministers on what they did in Brussels.

Of the institutions, it is the Court of Justice which has changed the most since then in terms of its structures. In 1982, there was one jurisdiction, with 11 judges and four Advocates General, making 15 members in all. Now there are three courts, with a total of 61 judges and eight Advocates General, making 69 members in all, with a proposal to add a further 12 judges for the General Court somewhere in the pipeline.

The most dramatic institutional change of all, however, concerns the attitude to, and practice of, Treaty reform. In the first two and a half decades of the existence of the EEC, the substantive policy provisions of the founding Treaty were not amended even once. A 1965 Treaty had merged the then three Councils and the three Commissions – one for each European Community – but this was really tidying up loose ends which could have been dealt with in 1957, while Treaty amendments of 1970 and 1975 had increased the European Parliament's role in the adoption of the annual budget and the supervision of its implementation. But the idea of substantive Treaty reform, or even the convening of an intergovernmental conference, was barely thinkable, and the best way to kill a policy initiative dead forever was to say, 'ah yes, but you'd need to amend the Treaty'.

II.

This is the world I stepped into in the summer of 1981, when I joined the European Parliament as a *stagiaire*, or "Robert Schumann scholar" as we were known. I was at first attached to the Directorate General for Research and Documentation, a sort of in-house think tank which was ready to come up with answers and/or the necessary documentation in

response to queries from individual members or committees. The very first question I dealt with was the right of environmental organisations to take legal proceedings; the questioner was preparing a possible own-initiative report proposing such a right as a matter of Community law. Remarkably, even after all these years, the issue still has a certain topicality, following the *Greenpeace* judgment of the Court of Justice, the Aarhus Convention and the Lisbon Treaty reforms to the Court's jurisdiction.

I only worked in Research and Documentation for a week or so before moving on to the secretariat of the Committee on Legal Affairs. As you might know, the European Parliament meets in plenary session for four or five working days per month, and a significant part of that time is spent either on voting on legislative matters, or listening to and debating political declarations by major political figures from within or outside the European Union. Debating time in plenary is therefore a scarce resource, carefully divided out for every agenda item amongst the political groups in function of their size and unattached members of Parliament in function of their number.

This means that for most purposes the real debate takes place, and the decisions are mostly adopted, in the parliamentary committees, subject to a possible reversal by the plenary. There are twenty committees, covering almost all areas of European Union activity: foreign policy, the adoption of the Union budget and control of expenditure, agricultural, transport, environment policy etc. etc. The committees, of course, comprise MEPs, with anything from about 25 to 65 members, and their political (and to a lesser extent national) composition is supposed faithfully to reflect the composition of Parliament itself. Each committee has a secretariat; when I started working in the Committee on Legal Affairs, we were just three administrators (that is, graduate-level officials), one French lawyer, one Italian and yours truly. Nowadays every committee secretariat has a minimum of six administrators, and some of the larger committees have a dozen or more. Our job in those days was first of all to organise the committee meetings – two one-day sessions per month – and secondly to advise rapporteurs and draftsmen on the possible content of the reports, opinions and working documents they would present at the meetings, or even to prepare a first draft where the topic was technical or uncontroversial. I imagine that very few items go through Parliament today without intensive lobbying of members by consultants and professional lobbyists, trade associations, unions, environmental groups, NGOs and interest groups of all kinds, big companies, even national and regional governments, including those of third States which happen to be interested.

The Committee on Legal Affairs was rather special in that it did not just deal with legislative proposals, but it also acted, and still does, as the legal advisor to the institution on the political level, particularly as regards questions of institutional relations and law. Moreover, at the time, the committee secretariat acted as a sort of unofficial legal service for the governing bodies and committees. The Committee itself raised and pursued questions of general interest which arose in the work in other committees, though only if there was the necessary political support for doing so. One of the first matters it had dealt with after the 1979 elections was whether Parliament should intervene in annulment proceedings to defend its rights in the consultation procedure. At the time, there were reservations within the institution regarding the appropriateness of Parliament's getting involved in litigation at all, particularly where this had been initiated by private parties against a fellow institution, or whether Parliament should stay out of, and hence "above", legal disputes. The Committee on Legal Affairs did not share those reservations, the institution agreed, and the rest is history.

It was also largely thanks to this committee that the Court of Justice was prevailed upon to open up the possibility for Parliament to take annulment proceedings in order to defend its prerogatives in the legislative and budgetary fields. In particular, the committee was instrumental in defining Parliament's defence in *Les Verts*, where, rather than challenging the admissibility of the annulment action on the obvious ground that the Treaty did not allow such

an action, Parliament actually argued in favour of an extensive interpretation of the jurisdictional clauses. The Court adopted this reasoning, and admitted the action; the committee followed up with a report saying that the Court should therefore allow proceedings by Parliament in order to preserve the rule of law under the constitutional charter the Court had so grandly proclaimed in *Les Verts*. In time, the Court accepted this reasoning too, in its ruling on the admissibility of Parliament's action in the *Chernobyl* case.

The committee also initiated the first ever inter-institutional proceedings for illegal failure to act, whereby Parliament challenged the absence of a proper transport policy a good 25 years after the EEC Treaty had entered into force. The Council did not even argue that such a policy existed, but contended instead that Parliament should not be allowed to use legal process to pursue its political ends. The Court threw this argument out and sure enough, within about six months, the Council itself was using legal process against Parliament to pursue its political ends in the budgetary field, and I might add, successfully so on this occasion.

III.

After seven years on the committee secretariat, I joined Parliament's legal service in 1988. Whereas the Council and Commission have each had a legal service since the dawn of Community time, the European Parliament only set up its legal service in 1986, largely as a direct response to the *Les Verts* and budgetary litigation of that year, and in anticipation of greater things to come. In those days, we were ten lawyers, of whom just two of us were based in Brussels. While a certain versatility of function was required, I was especially charged with advising the environmental committee.

By then we had the Single European Act. This introduced a second type of legislative procedure, the so-called "cooperation procedure", which applied for some, but not all, legislation, and which had put the question of the choice of legal basis firmly on the map. As the legal basis determined both the degree of parliamentary participation and the voting rule in the Council for the adoption of legislation, it became overnight a significant matter for all of the political institutions and the Member States, and very soon after for the Court of Justice too.

Before the Single Act, and in the absence of a specific Treaty foundation for environmental policy measures, the Council had regularly adopted uniform anti-pollution rules as common market measures, on the grounds that non-uniform rules would lead to obstacles to trade and distortions of competition between the Member States. The Court of Justice had even sanctioned this approach in two 1980 judgments. So when the Commission proposed anti-pollution rules after the SEA, it opted for the internal market legal basis, meaning cooperation and qualified majority voting. The Council, on the other hand, argued that this was precisely the type of measure the new environmental legal basis had been designed to cope with, thereby preserving the unanimity rule which had applied for the adoption of common market rules.

This was the mother of all legal basis battles, which the environment committee was eager to pitch into; in quick succession, Parliament intervened in the *Titanium dioxide* and *Waste Directive* cases (though it considered the latter a lost cause on the main question), and initiated the challenge to the *Waste Regulation*. I suppose these arcane disputes have long since been consigned to the dustbin of legal history, but they were the very lifeblood of institutional law in their time. Years later, the same question came round again, in the form of a turf war between environmental and commercial policy, in particular regarding the conclusion of international agreements regulating the trans-boundary movement of genetically modified organisms, of goods marked with an 'environmentally friendly' label and of waste, where the Court has provided a rather nuanced answer.

The environment committee followed the adoption of implementing legislation in its field of competence too; its famous victory in the *Pesticides* litigation in 1996 left such a mark on the Council that some years later it codified the Court's ruling in the second decision on comitology procedures. Though the Court sided with the Commission when Parliament challenged a decision allowing for the presence of genetically modified micro-organisms in organic foods, this proved to be a Pyrrhic victory of sorts for the Commission, as the Council amended the organic foods legislation at the first opportunity in order to ban the presence of any GMOs in such foods. Not long after, the Member States, many of whom simply did not trust the Commission in this area, adopted a moratorium on the authorisation of further deliberate releases of GMOs, which was kept in place for several years.

Of course it was not all environmental law. Parliament also challenged the 1990 students' residence directive, on the ground that it should have been adopted on the basis of what was then Article 7 EEC, with the benefit of the cooperation procedure, rather than the more restrictive Article 235 EEC, the legal basis of last resort. A month before the oral hearing in the students' residence case, the Court handed down a judgment providing a new interpretation of Article 7 EEC, meaning in effect that the written pleadings were out of date, and that there was everything to play for at the oral hearing. This was the first annulment action initiated by Parliament which it won on the merits.

The great thing about being an agent in Court cases, at least in the legal service of the European Parliament, is that you get to handle the case from the beginning right through to the end. The legal service lawyer following a particular committee can start the ball rolling by drawing the attention of the committee, through the chairman or rapporteur and/or the secretariat, to any legal problem. The committee may not be interested for political reasons, but if it is, it will ask the legal service to look into it. If the committee then wants to take legal proceedings, it will refer the question to the legal affairs committee, which as noted above acts as a sort of juridico-political filter; the legal service will be invited to make a pitch to that committee before the committee adopts its recommendation to the President of Parliament, who almost always follows the recommendation. If proceedings are commenced, then the same legal service lawyer will draft the written pleadings, and argue the case in front of the Court of Justice or General Court.

In disputes between the institutions, the respective positions of the parties are often well known, indeed sometimes debated in public, before pen is put to paper, though this is usually not so when the litigation is started by a disgruntled Member State or where the question arises in a request for a preliminary ruling. Sometimes, however, the Court itself comes up with surprises. In *Titanium dioxide*, for example, all Parliament was looking for in its intervention was a ruling that the contested directive was an internal market measure rather than falling within environmental policy. Instead the judgment provided was a slightly anxious analysis of the legal situation, concluding that the matter was both internal market *and* environmental in character, and that it was impossible to separate the two. The way out of this dilemma was to take account of the different procedures which would apply under each legal basis, and to opt for the one which best respected the democratic aspirations of the European Community, that is, the procedure which gave the European Parliament the greater influence in the policy decision.

All in all, I argued about two dozen cases before the Court of Justice, the last occasion being in the proceedings on the proposed agreement setting up a European Patent Court, as well as a handful of cases before the General Court. Pleading before the European Courts is probably the high point in the life of a member of a legal service, and the experience is one which is of inestimable value now that I participate in court hearings in a different capacity.

IV.

My third career in European law starts in 1995, when I joined the *cabinet* (private office) of the first Irish Advocate General appointed to the Court of Justice, Mr (now Justice) Nial Fennelly, as *référéndaire*. As you may know, there are eight Advocates General at the Court, of whom five are appointed from the traditional Big Five Member States, France, Germany, Italy, the United Kingdom and Spain, while the other three posts are occupied in rotation by the other 22 Member States. Each judge and Advocate General at the Court of Justice and General Court has a team of three or four *référéndaires* to help out in the preparation of judgments or opinions, as the case may be, and other aspects of the Court's activities. The official translation in English for this function is 'legal secretary' but that is rather misleading; if you look at the jobs section of some of the English newspapers, you will see ads for posts as a 'legal secretary', being a secretarial post in a firm of solicitors or in barristers' chambers. The American equivalent is 'law clerk', but that is also slightly misleading, albeit for a different reason. The position of law clerk to an American judge is occupied in the main by those who have recently graduated from law school, whereas most *référéndaires* at the Court of Justice (including the Civil Service Tribunal) will already have several years' experience, and often a solid track record of practice or teaching in the field of European Union law. The best rendition of the term is probably that used in Irish court parlance, "judicial assistant".

An Advocate General may be asked to deal with any matter of EU law under the sun: the admissibility of a request for a preliminary ruling where the factual and legal background of the national proceedings provided is almost but not quite non-existent, the free movement of generic pharmaceutical products, the customs classification of the hind parts of frozen chickens, the charging of VAT on the sale of cannabis resin in so-called 'coffee shops' in a certain nearby Member State, the legal character of the Commission's proposed fine on a Member State for not complying with a previous Court judgment, the export of fruit from the northern part of the island of Cyprus, the legal basis of the first directive on tobacco advertising, and so on. This variety did not entirely preclude a certain amount of informal specialisation. In the mid- and late 1990s, the Court had to deal with a large number of cases concerning the application of the 1979 Directive on the protection of wild birds, and later the provisions of the 1992 Habitats Directive concerning species protection, matters in which Mr Fennelly demonstrated a good deal of expertise. In one case, a French farmer had been prosecuted for keeping a domesticated specimen of a 'black Canada goose'. On closer inspection, the Advocate General discovered that there was no such subspecies, and that the description provided by the national judge was in fact based on a typing error. This allowed Mr Fennelly to make the immortal remark that the incorrect information in the request for a preliminary ruling had led the parties on a wild-goose chase, but for the fact that the specimen was tame....

In October 2011, I was appointed a judge of the European Union Civil Service Tribunal (or 'CST'), the first and so far only 'specialised court' established under the arrangements established under the Nice Treaty. This Tribunal is responsible for ruling at first instance on all disputes between the Union institutions and agencies and their staff (and former staff), as well as disappointed candidates in EPSO competitions for entry into the European Union civil service. If the CST was something of an experiment when it was set up in 2005, it is one which was thirty years in the making, the Court of Justice having suggested a European Community Administrative Tribunal for staff disputes in 1975. The Court's proposal was partly taken up with the creation in 1988 of the Court of First Instance, though this court also dealt with competition disputes from its inception, and has subsequently seen its jurisdiction expand dramatically.

The thinking behind the idea of specialist courts is twofold: to relieve the courts of general jurisdiction of a discrete category of legal dispute where there already exists a well-

established body of case law on the interpretation and application of the governing legal provisions, and to allow such specialist disputes to be dealt with by specialist judges as well as specialist lawyers. While 'specialist' in this respect, the CST is fully part of the institution described in Article 19 TEU, 'the Court of Justice of the European Union' and, as such, is bound to ensure that 'the law' is observed, including the Treaties, the Statute of the Court and the Union's Charter of Fundamental Rights, as well as general principles of EU law.

That said, the CST is 'special' too, in that it differs in a number of significant respects from the other two jurisdictions of the Luxembourg court. In particular, it comprises a mere seven judges, a number based on a (fairly accurate) assessment of its probable workload and the capacity of the judges to process this efficiently. As only a quarter or so of the Member States may have a judge in the CST at any one time, a special appointment procedure was also required; the Treaty authors opted for a sort of competitive selection, whereby a panel of senior judges and lawyers (in effect, persons who have been or could have been appointed to the Court of Justice or General Court) sift through the applications generated by a 'call for expression of interest' published in the *Official Journal*; any Union citizen who feels they have the necessary qualifications and personal capacity may apply. The panel then interviews the most suitable candidates and proposes to the Council at least twice as many names as there are posts available. It falls to the Council to ensure that the composition of the CST is 'balanced' in terms of the national origin and the 'national legal systems represented'. Judges are appointed for a six-year term which is theoretically renewable, though neither of the judges who applied in 2011 was in fact reappointed.

In form, the CST is an administrative court, similar in many ways to those of the civil law states; its sole task is to rule on the validity of acts (and omissions) of the administrations of the Union institutions. However, its remit is often described as litigation with a human face, in that the applicants are all natural persons, not companies, institutions or Member States. The CST therefore functions in some respects as a labour court, which may (and frequently does) seek to encourage the parties to settle their differences by means an amicable settlement rather than via a court judgment.

The modest size of the CST helps the cultivation of a collegiate spirit and facilitates the avoidance of any unwarranted inconsistency, which is particularly important for a court of first instance; even if the quasi-totality of the cases are handled by chambers of three judges, all but two of the judges of the CST each sit in two of the four such chambers, and all of the judges are kept fully informed of the positions proposed by the Tribunal in its various formations. One likes to recall that the Court of Justice itself, when it was established in 1952 was also essentially a specialised administrative court of seven judges.

Well, I may not have revealed any secrets of the European Court, but I hope I've given you a few ideas about the practice of European Union law in the institutions and the judiciary which is responsible for reviewing their decisions, should you too be considering a career in this field.

POLITICAL COMPROMISES: INFORMAL DECISION-MAKING IN THE COUNCIL OF MINISTERS – FRIEND OR FOE OF EUROPEAN INTEGRATION?

Giulia Giardi

1. Introduction

The methods of decision-making used by the Institutions of the European Union, and more specifically by the Council of Ministers, are laid out in the Treaties. However, the already complicated scenario one faces when trying to understand what happens during these procedures is rendered more confusing given the existence of *informal* procedures, which tend to dominate the day-to-day practice of the Union bodies.

In the Council of Ministers, political compromises have shaped the way in which its members work and, thus have influenced the policy measures which have emerged from their decisions. In this article, I seek to determine whether political compromises, such as the Luxembourg Accords and the Ioannina Mechanism, influence the decision-making process in the EU and in that case, if this occurs to the detriment of the integration of the community.

In order to answer this question, I will firstly look at the matter from a historical perspective. In the first section of this paper, I will discuss the political context that gave rise to the Luxembourg Accords and what their practical effect was. I will then follow the same procedure of analysis with regard to the Ioannina Compromise.

In the second section of my text I will describe the situation as it is today by explaining how and why the adoption of the Ioannina-bis mechanism came about, and subsequently how this affects the current decision-making procedure. In the second part of this section, I will illustrate the matter of the practice of the Council as it has developed since the Luxembourg Accords and as it is today.

Finally, in order to understand exactly what the results of political compromises and consensus-seeking behaviour are, we must look at the effect these have within a particular context. I have chosen to take a historical perspective and analyse the effects of these phenomena on European integration. This is what I will discuss in the third section of my paper.

2. Political Compromises – A Historical Perspective

2.1 The Luxembourg Accords

The Rome Treaty establishing the European Economic Community had set in motion a process of European integration, which was to be carried out in three stages. During the final of these, it was envisaged that there would be closer political union also, and to do so provisions for a change in voting rules had been set out. This transition entailed the use of qualified majority voting instead of unanimity from January 1966 onwards in certain policy areas.¹ One such area was that of agricultural policy which was of great interest to the French. What was of concern to them was not only the subject-matter, but also the measures to be adopted in this field and their mode of adoption. The proposals made by the Commission

¹ Teasdale, 'The Politics of Majority Voting in Europe', 67 *The Political Quarterly* 2 (1996), p. 103.

were of a more 'federalist' nature than previous ones, something that the French President Charles De Gaulle very much objected to.²

The disagreement between the French and the other five Member States, mainly based on the move to qualified majority voting, led to a disruption of the Communities for several months known as the 'empty chair' crisis.³ From June 1965 until January 1966, De Gaulle refused to attend meetings in the Council; furthermore, he obliged France's Ministers to boycott all Community activities. This boycott led to a paralysis within the Community and pushed the other Member States to come to a compromise with the French President.⁴

In substance, the other five Member States tried to appease De Gaulle by stating that in cases where vital interests pertaining to one or more Member States were at stake, when discussing a certain proposal that should have been voted on according to the rules of QMV, the members of the Council should do all that is possible to ensure that a solution could be found that would accommodate all members' interests. However, the French argued that in these situations there should be a reversion to the system of unanimity voting. The other Member States rejected the French position, however no agreement was reached between the five and De Gaulle regarding situations where no consensus could be found.⁵

Regardless of the fact that the Accord was strictly a 'gentlemen's agreement' with no legal foundation, its effect was immense. Because there was no strict rule as to its applicability, any Member State could invoke it at any time with reference to any subject matter.⁶ Its formal invocation was quite rare, but the mere fact that it could be used led to the creation of a static atmosphere, where the fact that a member of the Council disliked a proposal would lead to the discontinuation of further discussions on it.⁷ In practice, the Accord consisted in an agreement to disagree and its result was that of making voting the exception rather than the rule within the Council.⁸

For many years Community decision-making was immobilised by the threat of the invocation of the Accord, it was never formally repealed, but after the entry into force of the Single European Act in 1987, the use of QMV was extended in theory and in practice. A general intolerance for the paralysis that this compromise had given way to, and the urge to push forward integration, caused the Member States to move towards the opposite direction. Presumptions in favour of integration emerged substituting the previous preference for inaction.⁹

2.2 The Ioannina Compromise

Almost thirty years after the French imposition of unanimity voting, QMV began to stir up some controversy. Following the extension of qualified majority voting through the provisions of the Maastricht Treaty, which came into force in 1993, and the widening of the Union to include more and smaller members, tension began to build. Larger Member States felt that they risked losing their power to smaller ones, while having to face the greatest part of the economic brunt.¹⁰ Therefore, during the Ioannina Summit of 1994 the alteration of QMV rules, to accommodate the States due to become members, became the centre of a heated dispute between the EU 12.

² Craig and De Búrca, *EU Law: Texts, Cases and Materials*, (Oxford University Press, 2003), p. 13.

³ Teasdale, 67 *The Political Quarterly* 2 (1996), p. 103.

⁴ Craig and De Búrca, *EU Law*, p. 13.

⁵ Fairhurst, *Law of the European Union*, (Pearson Education Limited, 2010), p. 132.

⁶ Teasdale, 67 *The Political Quarterly* 2 (1996), p. 103.

⁷ Ibid.

⁸ Kapteyn *et al* (Eds.), *The Law of the European Union and the European Communities*, (Kluwer Law International, 2008), p. 25.

⁹ Teasdale, 67 *The Political Quarterly* 2 (1996), p. 103-104.

¹⁰ Ibid, p. 109.

The accession of Austria, Finland and Sweden, meant that some States would see a reduction of their vote shares. The main objectors to this change were Spain and the United Kingdom; they argued that the vote shares should not be altered and that the blocking minority conditions should remain the same even after enlargement.¹¹ If such a condition had been accepted, the votes needed for a blocking minority would have fallen from 30.3% to 25.6%, thus making it very difficult for a qualified majority to be reached.¹²

Following a series of meetings among the foreign ministers of each of the Member States, the United Kingdom's objection gradually lost most of its support from other countries. Finally, a compromise was reached which accommodated in part both the United Kingdom's view, but also that of the other Member States. The conditions for a blocking minority were altered in view of the accession of the new members (the threshold was shifted from twenty-three votes to twenty-six), but, in order to appease the British, two concessions were allowed.¹³ The first was that of concluding that the matter should be left open and returned to during the upcoming intergovernmental conference in 1996. Secondly, the Member States came to an informal agreement known as the Ioannina Compromise.¹⁴

This Compromise meant that where a decision was to be taken by a qualified majority, it would be sufficient for the blocking minority to fall between twenty-three and twenty-five votes for further discussions to take place on the matter.¹⁵ In practice, the possibility of invoking this compromise gave way to momentary pauses during the decision-making procedures where a Member State signalled its opposition to the adoption of a measure.¹⁶ However, differently to the Luxembourg Accords, its effect was less damaging to the policy-making process: time constraints were made explicit in the agreement and the wording of the compromise implied a rule of consensus rather than unanimity.

The agreement was later formalised within Council Declaration 50¹⁷ contained in the Treaty of Amsterdam in 1999, because the Member States continued to struggle to concur on the topic of blocking minorities.¹⁸ After the entry into force of the Nice Treaty in 2003, Ioannina was abandoned given the new rules of QMV.¹⁹

3. Political Compromises – The Situation Today

3.1 The Ioannina-bis Mechanism

Many years after the Luxembourg Accords and the Ioannina Compromise, qualified majority voting rules create tension within the Council. Further extension of membership in 2004 and 2007 has given way to a Union of twenty-seven States, and consequently of twenty-seven different sets of interests, needs and ideas. Furthermore, the Union is the competent legislator in many more fields compared to the past, with many more powers being conferred to the community level rather than the national ones. It can therefore be predicted that difficulties in

¹¹ Steunberg, 'Enlargement and institutional Reform between external and internal pressures', 12 *Constitutional Political Economy* 4 (2000), p. 352-353.

¹² Teasdale, 67 *The Political Quarterly* 2 (1996), p. 109.

¹³ Ibid.

¹⁴ Fairhurst, *Law of the European Union*, p. 133.

¹⁵ Kapteyn *et al* (Eds.), *The Law of the European Union*, p. 328.

¹⁶ Hertz and Leuffen, 'Comparing European Decision-Making before and after Eastern Enlargement', paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago (2010), available at: <http://www.jhubc.it/ecpr-porto/virtualpaperroom/077.pdf>, p. 8.

¹⁷ Bull. EU (1994/3) para. 1.3.28 O.J. 1994 C105/1 and O.J. 1995 C1/1

¹⁸ Tsebelis and Yataganas, 'Veto Players and Decision-making in the EU After Nice: Policy Stability and Bureaucratic/Judicial Discretion', 40 *Journal of Common Market Studies* 2 (2002), p. 290.

¹⁹ Foster, *EU Law: Directions*, (Oxford University Press, 2010), p. 51.

‘deciding who decides’ have increased, especially considering that problems already arose when there were only six members.

Currently, the rules on QMV are to be found in Articles 16 TEU and 238 TFEU, which officially make QMV the main method of action within the Council. Due to the controversies that have arisen regarding these rules, many Member States’ requests have been combined in a way that is satisfactory for all. First of all, the use of the new rules introduced by the Treaty of Lisbon, which came into force at the end of 2009, has been postponed to 2014 at the earliest and 2017 at the latest.²⁰ The new system of QMV substantially departs from the system of weighting votes and the requirement of a triple majority established under Nice.²¹

Until the end of October 2014, the rules will remain those established by the Nice Treaty in 2003, and voting will be governed by the procedure set out in Protocol 36 on Transitional Provisions (Art. 16 (5) TEU and Art. 3 (3) and (4) of Protocol 36 on Transitional Provisions). Between November 2014 and April 2017 the new rules adopted under the Reform Treaty will normally apply (Art. 16 (4) and (5) TEU and Art. 3 (2) of Protocol 36 on Transitional Provisions), however where a Member State makes a request for the rules established under the Nice Treaty to be used, this will be allowed (Art. 3 (2) of Protocol 36 on Transitional Provisions). From April 2017 onwards the new rules will be in force (Art. 16 (4) TEU).

The discussions leading up to the adoption of the Lisbon Treaty were often dominated by a divergence of views regarding the votes necessary to constitute a blocking minority. Among the most stubborn States was Poland, which pushed for the reintroduction of the 1994 Ioannina Compromise in its entirety in the text of the Treaty.²² One of the results of the Polish opposition was, in fact, the adoption of the transitional provisions contained in Protocol 36, delaying the use of the new Lisbon formula for QMV.²³ The greatest achievement of the Polish opposition was that of a new form of the Ioannina Compromise being adopted officially through a Council Decision.²⁴ This new version of Ioannina was, contrary to Polish request, not introduced in the Treaty’s main text, but it was agreed that any modification to it would only occur by a unanimous Council agreement, thus appeasing Poland by giving it the possibility to veto any modifications made to the Decision.²⁵

The Decision creates the possibility for Member States, which reach a number close to, but not equal to a blocking minority, to stall the decision-making procedure where the *new* Lisbon QMV formula applies.²⁶ Until the end of March 2017, where the Council members opposing a decision represent a minimum of 75% of the population or 75% of the number of Member States necessary to constitute a blocking minority, further discussions will take place until an agreement is reached in due time (Articles 1 and 2 of Council Decision (2009/857/EC)). From April 2017 onwards, the number of members of the Council necessary to push for continued discussions must represent at least 55% of the population or 55% of the Member States (Articles 4 and 5 of Council Decision (2009/857/EC)). Articles 2 and 5 of the Decision imply that the members of the Council will try to reach a consensus on the matter at hand.

²⁰ Ibid.

²¹ For a detailed description of the requirements set out in the Nice Treaty see: Craig and De Búrca, *EU Law*, p. 155.

²² Dinan, ‘Governance and Institutional Developments: Ending the Constitutional Impasse’, 46 *Journal of Common Market Studies* (2008), p. 81.

²³ Ibid, p. 79.

²⁴ Council Decision (2009/857/EC), [2009] O.J. L314/73.

²⁵ Dinan, 46 *Journal of Common Market Studies* (2008), p. 84.

²⁶ Carbone, ‘From Paris to Dublin: Domestic Politics and the Treaty of Lisbon’, 5 *Journal of Contemporary European Research* 1 (2009), p. 52.

3.2 The Consequences – Decision-making Based on ‘Consensus’

The Treaties provide us with a framework of decision-making procedures and we presume that the Union Institutions follow these texts to the letter. Often, we are confronted with hypothetical situations where we try to estimate the outcome of a legislative process by relying on what is found in the theory of the legal texts on which the Union is based. However, after having seen how different interests and fears can prompt Member States to call for political solutions, which do not correspond to the wording of the Treaties, we should wonder whether in practice the workings of the EU Institutions really resemble the theory.

Qualified majority voting has been at the centre of disputes between members of the Council since its introduction in the EEC Treaty. At the end of the last century, members of the Council haggled to have their requests met concerning vote shares and blocking minorities, and this discussion has persisted to this day. What is striking though is that what has resulted from these constant disagreements has less to do with voting explicitly than one would imagine. In fact, the result has been that of avoiding going to a vote altogether in the day-to-day practice of the Council.²⁷

In order to understand why this occurs, we must turn to the decision-making procedure within the Council itself and its effect on the members’ behaviour. When analysing the dynamics of Council action, many authors speak of a ‘culture of consensus’ and also use terms like reciprocity, bargaining, mutual responsiveness and compromise to describe the atmosphere and workings of the meetings of the Council and COREPER.²⁸ This is clearly a consequence of political agreements such as the Luxembourg Accords and the Ioannina Compromise, which have given way to a preference of accommodating everybody’s interests rather than forcefully outvoting each other. No outright veto is actually given to the members of the Council, but rather further discussion is encouraged in order to reach a consensus.²⁹ This is true particularly of Ioannina and the current Ioannina-bis mechanisms.

It has been argued that a ‘cooperative bargaining model’ can describe the policy-making approach within the Council, where deals take place among the members. The result is that many are prone to abandoning strict national interests to come to a conclusion that considers all diverging opinions.³⁰ There are many reasons why this method of decision-making is preferred. These reasons go beyond the mere fact that, historically, political compromises have shaped the process in this way.

Firstly, consensus-seeking practice is more efficient than QMV in the Council. One can imagine that where a vote is taken on a particular issue, usually the result of that vote indicates the conclusion of the matter. In a situation where the parties bargain to find a solution, any one matter is never actually permanently set aside; but rather once something has been agreed, other interests which will have been momentarily postponed will be the topic of discussion in a later meeting.³¹ Behind this approach lies a rather neo-functionalist sort of reasoning, in that the coming to a compromise on one issue leads the way to a compromise on a later issue. In a system where QMV is used strictly, the fact that a qualified majority is reached means that often the interests of those members that have opposed the adoption of a certain policy will remain completely ignored.³² Secondly, the making of new policies may actually be easier when using a rule of consensus rather than one of QMV. This is because

²⁷ Heisenberg, ‘The institution of ‘consensus’ in the European Union: Formal versus informal decision-making in the Council’, 44 *European Journal of Political Research* (2005), p. 68.

²⁸ Heisenberg, 44 *European Journal of Political Research* (2005), p. 68-69.

²⁹ Hayes-Renshaw, Van Aken and Wallace, ‘When and Why the EU Council of Ministers Votes Explicitly’ 44 *Journal of Common Market Studies* 1 (2006), p. 164.

³⁰ Schalk *et al*, ‘The Power of the Presidency in EU Council Decision-making’, 8 *European Union Politics* 2 (2007), p. 234-235.

³¹ Heisenberg, 44 *European Journal of Political Research* (2005), p. 70-71.

³² *Ibid*.

abstentions do not lead to a negative outcome where the members of the Council try to reach a compromise.³³

However, there are also negative aspects to be considered with regard to the practice of searching for consensus when making decisions in the Council. First of all, there is a clear problem as to transparency, a principle enshrined in the Treaties by virtue of Article 15 (3) TFEU. Where the procedure used by the Council is different to that prescribed by law, this creates a problem for the citizens of the Union who are not aware of how decisions that affect them are being made and exactly who supports which ideas.³⁴ This then leads us to the second problem, that of democratic accountability, whereby the citizens should have a right to know what proposals and bargains are brought forward by their representatives in the Council so as to make a fully informed decision when they subsequently exercise their voting rights.³⁵

4. *Political Compromises – The Effect on Integration*

The progress of European integration needs to be analysed from a theoretical point of view and through the observation of what has happened in practice. Both perspectives will be discussed in turn.

If we turn back to the origins of the European Union, to the coming together of six States following the disasters of two of the most tragic events of the history of our planet, we see at its origin a brilliant idea, that of Jean Monnet. Monnet's plan, aimed at avoiding any future conflicts among nation-states of the old continent, did not have a self-proclaimed functionalist approach, but it is apparent from the words used by him to describe it, that functionalism is the best framework in which to insert what then became the Schuman Plan.³⁶

According to this theory of integration, developed by David Mitrany, the only way to ensure peace throughout time would be to encourage continuous social cohesion that would take place gradually over time and would do so by accommodating the changing needs and adapting to the mutating conditions of the community. Having as a goal the satisfaction of the common needs of society, the leaders of the nations would be able to coordinate their policies in determinate areas with specific interventions. This method would be accepted because of its minimal intrusion into the constitutional identities of the various nations, and also because little of the political power yielded by their leaders would be threatened.³⁷ This technocratic approach can clearly describe what happened in practice with the establishment of the ECSC in 1952.

However, the evolution of the union that existed among the six Member States from the ECSC to the EEC and EURATOM could not sufficiently be explained by the functionalist theory of Mitrany. According to neo-functionalism, as theorized by Ernst Haas and Leon Lindberg, individual States are pushed to cooperate amongst each other because of the benefits this cooperation provides for all. In their view of integration, the concept of spill-over effect is central, according to which integration in one sector brings about integration in another and, in turn, integration in another sector still. Supporters of neo-functionalism believed this could ultimately lead to political integration also.³⁸

Unfortunately, the Luxembourg Accords blocked the ideal course of events envisaged by Monnet and the hopes of the supporters of the neo-functionalism theory. The push for the

³³ Ibid.

³⁴ Ibid, p. 82-83.

³⁵ Ibid, p. 83-84.

³⁶ Nelsen and Stubb (Eds.), *The European Union: Readings on the Theory and Practice of European Integration*, (Palgrave Macmillan, 2003), p. 19.

³⁷ Ibid, p. 101-110.

³⁸ Craig, 'The Community Political Order', 10 *Indiana Journal of Global Legal Studies* 1 (2003), p. 81-83.

recognition of national interests, imposed by De Gaulle in 1966, gave way to a form of negative intergovernmentalism. The Council's approach became one where national interests were dominant and where areas that were politically sensitive would not be touched. The main goal of intergovernmentalism as envisaged by Stanley Hoffman is that of allowing for integration only in policy fields of less importance, while strictly maintaining sovereignty within the nation.³⁹ The reason that the compromise reached in Luxembourg led to a negative form of intergovernmentalism is that the reluctance of the Council to vote almost stopped integration altogether.

Following the introduction of the Single European Act, the form of intergovernmentalism that had developed due to the Luxembourg Accords, changed from negative to positive. Not only this, but it transformed to an extent that political theorists like Andrew Moravcsik came up with a new form of it. He described the process of integration through an idea of liberal intergovernmentalism. This theory best explains the effects of the choice of the Council to continue to make decisions by consensus rather than voting and thus also of the introduction of the Ioannina mechanism in 1994 and its subsequent confirmation in the Lisbon Treaty. According to Moravcsik, it is states that drive integration forward; however, they do so by making choices that can appeal collectively rather than individually. This is done through a process of negotiation, which leads to agreements that can generate gain for those who participate in the negotiations. This form of intergovernmentalism, which reflects the 'culture of consensus' adhered to by the Council, has greatly encouraged the process of integration in the EU.⁴⁰

5. Conclusion

The rules on decision-making in the European Union are central to its growth and development, which is why it is so important to determine what factors can affect these procedures positively or negatively.

In the first part of this paper, it is shown how this delicate topic can give rise to similar solutions with different consequences. Even though both the Luxembourg Accords and the Ioannina Compromise were political agreements that substantially called for decisions to be made in view of a common opinion, their effects were opposite. The Luxembourg Accords led to a rule of unanimity being adopted and later a *negative* no-voting policy. The Ioannina compromise, even though it was based on specific rules of QMV, substantially reinforced a *positive* no-voting policy in the Council.

In the second section it was evidenced that old habits die hard in the Union and that, the Council, regardless of disputes regarding the technicalities of QMV, still opts for a method that makes voting an anomaly. This was made very clear in the second part of this section where I explained how political compromises have altered the decision-making process in the Council by encouraging a 'culture of consensus'.

Finally, I considered the implications of this 'culture of consensus' which is so strongly part of the Council's *modus operandi*. To do this I turned back to the origins of its use, namely the Luxembourg Accords. We see that since De Gaulle's imposition of his anti-supranational views, voting has become the exception rather than the rule in the practice of the Council of Ministers. Initially, the search for consensus was equal to that for unanimity. This meant that integration was stalled for many years to the detriment of the community at large and in favour of the stubborn protection of national interests. Thus, the neo-functionalist hopes, which were the foundations of the Union, were destroyed by De Gaulle's negative intergovernmentalism.

³⁹ Nelsen and Stubb (Eds.), *The European Union*, p. 163-177.

⁴⁰ Craig, 10 *Indiana Journal of Global Legal Studies* 1 (2003), p. 95-96.

This habit of consensus searching then transformed from each member shielding its interests, to the members bargaining with each other in order to accommodate over time everybody's needs and desires within the limits of reasonability. Therefore, the effect that political compromises have had on decision-making and, in turn, on integration, has varied over time. The Union has witnessed moments of paralysis where politics and national interests dominated, but also moments of great integration where politics have actually facilitated the promotion of community interests.

THE PRESIDENT OF THE COMMISSION: TRUE PRESIDENT OR JUST FIRST AMONG EQUALS?

Finja Draxler

1. Introduction

The Commission President, as established by the Treaty of Rome in 1957¹, plays a major role in the functioning of the European Union, as he is formally the head of the main executive body. Within the Commission, the President is often said to be the *primus inter pares* (first among equals) among his fellow Commissioners. However, in practice he has gained a lot of power and depending on the integration cycle some scholars would even go as far as calling him the face of the European Union.² Moreover it is to be said, that in order for the Commission to be successful, a strong leader is needed because he is to represent the institution as a whole.³ Furthermore, personality and skill of a president are a major factor regarding how influential he and the Commission as a group will be.⁴ Looking at history, this role has varied considerably over the years through the different presidencies.

In this paper the role of the president of the Commission will be critically examined. The focus is on the question of how the President has gained power in his position over the last decades in comparison to the individual Commissioners. This is done by firstly analyzing the history and looking at how the office was established. Following this, a closer look will be taken as to how the Commission is set up, how the President is appointed and which duties and powers he has compared to the other Commissioners. The major treaty amendments will then be taken into consideration. This includes the Treaties of Rome, Nice and Amsterdam as well as the latest Lisbon Treaty, which changed the appointment procedure of the President. Finally, the position of the previous Presidents will be assessed; this is of importance in order to understand how the various people had different impacts on the Commission and moreover how the Union became what it is today. Particularly important to mention here are Jaques Delors, who arguably was the strongest and most influential president of the Commission so far and Jacques Santer, under whom the Commission went through a crisis and in the end resigned as a body. Lastly, the current Barroso Commission will be examined.

2. The Establishment of the European Commission and its first President- The Treaty of Rome

Determined to establish an ever closer union among the European peoples...` these are the introductory words of the preamble of the Treaty of Rome, which called for further integration of the already existing six member states in 1957. Thus, the treaty was the basis for the European Economic Community, the free trade area and inter alia created institutions, which were similar to those of the previous European Coal and Steel Community. The ECSC already included a High Authority, which by virtue of the Treaty of Rome became the

¹ Nigel Foster, *EU law*, (Oxford University Press, 2010), p.11.

² P. Nedergaard, *European Union Administration: Legitimacy and Efficiency*, (Koninklijke Brill NV, 2007), p. 99.

³ M. Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, (Manchester University Press, 1996), p. 38.

⁴ P. Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

European Commission.⁵ The newly established Commission was given the exclusive power to grant legislation by the same treaty.⁶

The German national Walter Hallstein was elected to become its first President and he was to influence the Union greatly. As Hallstein was one of the drafters of the Treaty of Rome, Jean Monnet became his main supporter to be elected as President of the newly founded Commission.⁷ Due to the fact that the Commission was considered to be above the national level, the President-elect was seen more as a European candidate, rather than a German one.⁸ During his presidency, Hallstein was known for his activism and his commitment for the Commission to act independently.⁹ Indeed, Hallstein is often referred to as the most powerful president in history next to Jaques Delors because he was said to be the driving force behind the European integration process.¹⁰ Additionally, it is important to mention that the Hallstein Commission was arguably very single-minded as it acted more like a political party or highly organized pressure group rather than...an administrative organization.¹¹ This stems from the fact that Hallstein as a president was very authoritative within the Commission.¹²

Only due to Hallstein's hard work, his successors in the 1970s played a role in the political projects of the Union.¹³ Following his presidency, the Belgian Jean Rey succeeded the post in 1967. However, he never became as popular and powerful as Walter Hallstein was. It can usually be said that after the presidency of a high-profile Commission President, governments tend to elect a weaker, less powerful figure; and as aforementioned, this can be observed in the example of Rey's succession to Hallstein.¹⁴

3. *Composition of the Commission*

Since the Treaty of Nice, the European Commission consists of 27 Commissioners, more precisely one Commissioner from each member state. In this number the President of the Commission is also included. Moreover, all of them together form the College of Commissioners. They are elected on the basis of suggestions from the national governments, the Council and the President-elect.¹⁵ From 2014 onwards, the number of Commissioners should be corresponding to two-thirds of the number of Member States.¹⁶ The Commissioners are further divided into 24 Directorates- General (DG), which are each headed by one of them.¹⁷ Furthermore, the Commission has one General Secretariat, which can be seen as the personal DG of the president.¹⁸

At the time of establishment of the Commission, Commissioners were only allowed to have two cabinet members. Solely the President was entitled to four people.¹⁹ However, it is now

⁵ R. Holmes Beck, *The changing structure of Europe: economic, social and political trends* (Oxford University Press, 1970), p. 15.

⁶ Peterson, 'The Santer era: The Commission in normative, historical and theoretical perspective' 6 *Journal of European Public Policy* 1 (1999), p. 51.

⁷ Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, p. 38.

⁸ Ibid, p. 37.

⁹ Ibid, p. 38.

¹⁰ Ibid, p. 38.

¹¹ Coombes 1970:311 taken from Peterson, 6 *Journal of European Public Policy* 1 (1999), p. 102.

¹² Peterson, 6 *Journal of European Public Policy* 1 (1999), p. 51.

¹³ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 100.

¹⁴ Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, p. 200.

¹⁵ Article 17(7) TEU

¹⁶ Article 17(5) TEU

¹⁷ Chalmers; *European Union Public Law* (Cambridge University Press, 2010), p. 57.

¹⁸ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 103.

¹⁹ Ibid.

common to have 12 cabinet members.²⁰ All Commissioners are elected for a five year term, which is renewable.²¹ In addition, all of them must be chosen from people whose 'independence is beyond doubt'.²² This means that they may not take any instruction from a body, such as the Member States.²³ Furthermore, when in office, they may not engage in any other form of occupation.²⁴ In case of failure to observe these rules, a Commissioner may be forced to retire compulsory if the Court of Justice so orders. For this procedure, application must be brought by the Council or the Commission.²⁵ However, the independence principle must be seen in relative terms because the Commissioners usually are high-ranked politicians in their respective Member States and usually continue to stay in contact with their national governments.²⁶

4. *The Commission President*

4.1 The Appointment Procedure of the Commission President

Article 17 (7) of the Treaty on the European Union (TEU) lays down that the Commission President is to be proposed by the European Council to the European Parliament, by qualified majority voting (QMV). He is finally elected by the majority of the component members of the European Parliament.²⁷ If no majority is reached, then a new candidate must be put forward by the European Council and the same procedure is to be followed again.²⁸ After the entering into force of the Amsterdam treaty in 1999, the elections to the European Parliament must also be taken into account, when choosing a new president.²⁹

Thus, in order to become President, a candidate must make sure to have the support of a dominant party within the European Parliament.³⁰ When looking at the previous Presidents, it can be said that the post seems to rotate between the Conservative and Socialist parties of the Member States.³¹ The European Parliament also decides over the appointment of all 27 commissioners; however the EP may only dismiss the Commission as a body and not one Commissioner individually.³² However, this has never happened so far.

There are various criteria, to determine whether a candidate is suitable for the position of the Commission President. These include his competences, political loyalties and a "European attitude".³³ Most former Presidents, have been leading politicians in their national countries prior to their appointment in the European Commission. Furthermore, if a President would like to be re-elected, he will have to make sure that no one, possessing power to reappoint him, more precisely national governments and Parliament, is offended by him, as this can have major consequences on his re-election.³⁴ So far there were only Presidents from the six

²⁰ Ibid, p. 107.

²¹ Article 17(3) TEU

²² Ibid.

²³ Chalmers; *European Union Public Law* (Cambridge University Press, 2010) , p. 54.

²⁴ Ibid.

²⁵ Chalmers; *European Union Public Law* (Cambridge University Press, 2010) , p. 54.

²⁶ Ibid, p. 55.

²⁷ Article 17(7) TEU

²⁸ Ibid.

²⁹ Ibid.

³⁰ P. Graig and G. De Burca, *The evolution of EU law*, (Oxford University Press, 2011), p. 79.

³¹ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

³² A. El-Agraa and B. Ardy, *The European Union: Economics and Policies*, (Cambridge University Press, 2011), p. 39.

³³ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 100.

³⁴ Chalmers, *European Union Public Law*, p. 57.

founding member states plus the United Kingdom and Portugal.³⁵ Some people claim that direct elections for the Commission President are needed, as this would support the principle of sovereignty of the citizens of Europe, which lies at the heart of the European Union.³⁶ However, counter arguments draw on the fact that this would rather politicize the post of the Commission President and therefore the indirect election modus was kept.³⁷

4.2 The Current Powers and Duties of the President of the Commission

The Commission as an institution has major executive and administrative powers. Within the Commission framework, the President has a central post, as the leader of the institution. The Commission President's powers are laid down in Article 17(6) TEU. The current President is José Manuel Barroso from Portugal. He has five important roles, which will be described below.

Firstly, the President of the Commission, together with the heads of the government, nominates the other Commissioners, who are then to be approved by the EP and appointed by the European Council by QMV.³⁸ Since the appointment of Romano Prodi as President of the Commission in 1999, it has been accepted that the President can reject candidates from certain Member States. However, that does not mean that he is free to choose his own College of Commissioners.³⁹

Secondly, he is responsible for the internal organisation of the Commission, as he is the one who allocates the portfolios to the individual commissioners. If for some reason there is a problem with the allocation, he is also able to shift the portfolios during his term of office.⁴⁰ Hence, he also has the power to isolate an individual Commissioner.⁴¹ Each individual Commissioner is then responsible for the work, which falls within his policy area.⁴²

Thirdly, by virtue of Article 245 of the Treaty on the Functioning of the European Union (TFEU), the President can request the individual Commissioners to resign. Hence, all Commissioners are responsible to him individually.

Fourthly, the political guidance of the Commission is up to him. More specifically this means that he is to chair and set the agenda for the weekly Commission meetings.⁴³ Moreover, he can lay down the political aims of the Commission by choosing which proposal he pushes forward for adoption by the Commission. This is also seen by the fact that the stronger the President, the more powerful is the Commission as a whole.⁴⁴

Lastly, he also has a roving policy brief, which entails the fact that, although it sometimes creates tensions among the individual Commissioners, the President is allowed to take over a certain issue and make Commission policy on that topic.⁴⁵

Next to these five main powers, he also has representative functions; he follows the meetings of the European Council, the G8 meetings and the major debates of the Council of Ministers and the European Parliament.⁴⁶ He also holds further powers, such as the task to appoint the

³⁵ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

³⁶ B. Marquesinis, *The British Contribution to the Europe of the 21st century*, (Hart Publishing, 2002) p. 209.

³⁷ P. Graig and G. De Burca, *The evolution of EU law*, (Oxford University Press, 2011), p. 80.

³⁸ Article 17(7) TEU

³⁹ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

⁴⁰ Chalmers; *European Union Public Law*, p. 56.

⁴¹ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

⁴² Chalmers; *European Union Public Law*, p. 54.

⁴³ Ibid, p. 56.

⁴⁴ Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, p. 38.

⁴⁵ Chalmers; *European Union Public Law*, p. 56.

⁴⁶ President of the European Commission- José Manuel Barroso: available at http://ec.europa.eu/commission_2010-2014/president/index_en.htm (last visited, 06.12.2011).

six Vice-Presidents from his fellow Commissioners.⁴⁷ Furthermore, he is, together with the European Council, responsible for the appointment of the High Representative of the Union for Foreign Affairs and Security.⁴⁸ However, this new relationship with the High Representative challenges the authority of the President's position as the first among equals within the Commission because he cannot ask the High Representative to resign on his own.⁴⁹ The consent of the European Council is also needed.

Furthermore, the Commission President, in corporation with the President of the European Council, prepares the Council meetings in order to ensure the correct working of the Council.⁵⁰ However, the President's most important task overall is to push for forward movement of the European Union.⁵¹ Nevertheless, and no matter who is President, the Commission can only be successful when national preferences are taken into consideration.⁵²

4.3 Treaty Amendments after Maastricht: The Treaties of Amsterdam, Nice and Lisbon

The President has gained important powers in recent times due to various treaty amendments. Professor Damian Chalmers claims that the President has become a more central figure within the commission during the past years.⁵³ More specifically, since the Treaty of Amsterdam, which entered into force in 1999, he really is to be seen as the leader of the Commission. The Treaty provides that 'the members of the Commission shall carry out the duties devolved upon them by the President under his authority'.⁵⁴ It was also pointed out in the treaty that it is the President's responsibility to guide the Commission so that the collective responsibilities are strengthened.⁵⁵

The following Treaty of Nice in 2001 laid down a limit of one instead of two Commissioners per country. Concerning the Commission President, it further enhanced his position by making a clear distinction between him and his fellow commissioners with regard to the appointment procedure.⁵⁶ Under this treaty it was also firstly possible for him to fire individual ministers, a power which makes him stand out in the Commission.⁵⁷ Furthermore, it changed from the unanimous vote requirement in the Council to merely qualified majority voting.

The Lisbon Treaty was important for the Commission as it laid down that the Commission President is to be elected indirectly. Moreover, the latest Lisbon Treaty now states that the President is to be elected by the European Parliament, rather than accepted.⁵⁸ However, as the requirement that the outcome of the European elections must be taken into consideration already existed, this new treaty provision was not a real change.⁵⁹ According to Professor

⁴⁷ D. Curtin, *Executive Power of the European Union: Law, practices and the living constitution*, (Oxford University Press, 2009), p. 94

⁴⁸ Article 18(1) TEU

⁴⁹ Graham Avery, "The new architecture for EU foreign policy", in *The people's project? The new EU Treaty and the prospects for future integration*, ed. Graham Avery et al (European Policy Centre, 2007), p. 19; Brian Crowe, *Foreign Minister of Europe*, (Foreign Policy Centre, 2005).

⁵⁰ Graig and De Burca, *The evolution of EU law*, p. 80.

⁵¹ President of the European Commission- José Manuel Barroso: available at http://ec.europa.eu/commission_2010-2014/president/index_en.htm (last visited, 06.12.1011).

⁵² Graig and De Burca, *The evolution of EU law*, p. 48.

⁵³ House of Lords, *The Treaty of Lisbon: an impact assessment* (10th report of session 2007-08), p. 60.

⁵⁴ Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 101.

⁵⁵ Article 219 of the Treaty of Amsterdam

⁵⁶ D. Curtin, *Executive Power of the European Union: Law, practices and the living constitution*, p. 92.

⁵⁷ The European Commission: available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/nice_treaty/nice_treaty_commission_en.htm (last visited on 06.12.2011)

⁵⁸ House of Lords, *The Treaty of Lisbon: an impact assessment* (10th report of session 2007-08), p. 60.

⁵⁹ Ibid, p. 64.

Damian Chalmers, the Commission is now moving more towards a presidential system, rather than keeping the British style system with the notion of first among equals.⁶⁰ The British Minister for Europe said about the Lisbon Treaty, that the formal powers of the Commission President have not really changed, but the Commission itself has become more influential and therefore its President will also be more powerful in the future.⁶¹

5. *Presidents who Shaped the Union*

5.1 The Delors Commission

This section will consider the great European, Jacques Delors, without whom the Commission would not be as influential as it is nowadays. The French politician became President of the Commission in 1985 and was re-elected twice, which makes him the only person, who was President for three terms. His presidency is known to be one of the most successful ones and he shaped the integration process of the European Union greatly.⁶² One can say, that his name was to a great extent synonymous with the Commission.⁶³ For the first time, the personality of a President also became of importance; this was new for the Union, which is based on a supranational level and never really took an individual into account.⁶⁴

Many of Delors' predecessors did not stand out as strong leaders because they did not want to offend national governments.⁶⁵ Furthermore, it is to be said that in 1985 he did not have the significant powers a Commission President enjoys now. However, this did not pose any problems to Mr. Delors, who gradually turned the position of the Commission President into a position of leadership and strength.⁶⁶

Jacques Delors was President during a time that could be regarded as a positive integration cycle. Many important achievements such as the establishment of the Treaty on the European Union and the Single European Act fell within his time of presidency. Moreover, it is important to note that when the Commission has a strong leader, such as Jaques Delors, the whole Union makes progress.⁶⁷ Additionally, J. Peterson claims that much of Delors' success was in connection with the fact that a significant part of the Single European Act was written by one of his cabinet members and personal advisor, François Lamoureux.⁶⁸ This shows, that individual Commissioners may also have influence on the functioning of the Commission as a whole.

5.2 The Santer Crisis

Considering the pattern, that often shows a weaker candidate after a strong leadership; the Luxembourger Jacques Santer had a rough start from the beginning following Jacques Delors.⁶⁹ He knew from his inauguration that he would not be able to live up to the famous Mr.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Nedergaard, *European Union Administration: Legitimacy and Efficiency*, p. 99.

⁶³ Ibid.

⁶⁴ Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, p. 200.

⁶⁵ Peterson, 6 *Journal of European Public Policy* 1 (1999), p. 51.

⁶⁶ Cini, *The European Commission: Leadership, organisation and culture in the EU administration*, p. 200.

⁶⁷ A. Moravcsik, *The choice for Europe: social purpose and state power from Messina to Maastricht* (Cornell University Press, 1998), p. 56.

⁶⁸ Peterson, 6 *Journal of European Public Policy* 1 (1999), p. 51.

⁶⁹ Ibid.

Delors. This can be seen in the fact that nobody chose him to be his first choice for replacing Jacques Delors.⁷⁰

When Santer came into power in 1995, he was faced with a group of high-ranked national politicians, consisting of former Prime -Ministers and Foreign Affairs Ministers.⁷¹ His fellow Commissioners often undermined his authority by making statements that did not follow the agreed line of the Commission.⁷² One clear example is when Ritt Bjerregaard, the Danish Commissioner, published diaries filled with portrayals of Mr. Santer and which violated the internal rules of procedure of the Commission.⁷³ However, it was harder for him to exercise authority like Delors did, as the College of Commissioners became bigger after the enlargement in 1995 and therefore became harder to lead.⁷⁴ A further problem, which Santer experienced from the start was that he lacked new ideas concerning European integration.

At the end of 1998 the crisis of the Santer Commission was breaking out, as one of the Commission officials from the financial control unit informed the European Parliament of the mismanagement in the financial sector of the Union.⁷⁵ To demonstrate the gravity of the crisis the EP then considered a motion of censure against the Commission.⁷⁶ A committee of independent experts was assigned to investigate on the matter and found that the institution lacked transparency and accountability.⁷⁷ In response to the report the EP chose to lay down an ultimatum for the Commission to react to the report and accept a plan created by the EP or to resign as a body. The Santer Commission chose to do the latter and resigned en masse on March 16, 1999. This demonstrates how important the European Parliament became as an institution and clearly shows the Commission's respect concerning the EP's budgetary and supervisory powers.⁷⁸

After the fall of the Santer Commission, the whole institution lacked legitimacy and it was difficult for the following president, Romano Prodi, to face the weak image of the institution, which he chaired, had.⁷⁹ Furthermore, it can now also be seen, that during the Santer crisis the MEPs really fulfilled their tasks of fighting fraud and pushing for accountability.⁸⁰

5.3 The Barroso Commission – 2004 until Today

José Manuel Barroso got elected as Commission President in 2004 and still serves the post. In 2004, a consequence of the Santer crisis was seen in the fact that during the hearing for the Barroso Commission, the EP had an increasing role in choosing the Commissioners. Due to the fact that several MEPs were against certain nominees because of grounds such as conflicts of interests and insufficient qualifications, Mr. Barroso had to shuffle the portfolios and take account of new nominations for Commissioners.⁸¹ Furthermore, some Member States had to accept the rejection of their nominees.⁸² This was the case with Italy because their candidate, Rocco Buttiglione, made conservative comments concerning homosexuals and women.⁸³

⁷⁰ Ibid, p. 53.

⁷¹ Peterson, 6 *Journal of European Public Policy* 1 (1999), p. 50.

⁷² Ibid, p. 51.

⁷³ Ibid..

⁷⁴ Ibid.

⁷⁵ R. Stapenhurst et al, *The role of parliament in curbing corruption*, (The World Bank, 2006) , p. 151.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, p. 152.

⁸¹ Ibid, p. 153.

⁸² Ibid.

⁸³ E. Best et al, *The institutions of the enlarged European Union: continuity and change* (MPG Books Ltd., 2008), p. 71.

During Mr. Barroso's first term in office, there were two major failures on part of the Commission. The first one is in relation with the economic crisis, which the Commission failed to predict.⁸⁴ What is more is that it seemed that prior to the crisis, the institution was reluctant to regulate the financial markets.⁸⁵ Also, the Commission failed to act after the crisis has already broken out.⁸⁶ Secondly, the Commission was criticized as lacking political leadership.⁸⁷ Critics claim that the Commission has been influenced by the Member States to a large extent. What can also be said is, that during the treaty ratification process of the Constitutional Treaty and later on the Lisbon Treaty, the Commission rather stayed out and preferred to be a non-actor.

In 2009, Mr. Barroso was re-elected as Commission President. After its election, the current Commission claimed that it is one of their main objectives during their time in office to enhance accountability.⁸⁸ They are planning on doing so by moving towards a positive statement of assurances. José Manuel Barroso, even though he has fundamentally more powers, than for example Jaques Delors did, does not use it as much as he could. It is to be said that Barroso is not one of the strongest Presidents the Commission has seen, even though he has considerably more powers laid down in the legal base. It will remain open how he leads the Commission in the upcoming years.

6. Conclusion

Over the last years, the Commission President has gained important powers by treaty amendments, in comparison to his fellow Commissioners. This can be seen by the fact that he is to give political guidance to the Commission. Furthermore, he is involved in choosing his College of Commissioners and in the end every Commissioner is responsible to the President, as he can force him/her to resign. It is also the President's duty to allocate the portfolios to the commissioners; however if his allocation does not work out he can also reshuffle them and isolate an individual Commissioner. Even though the more recent Presidents had significantly more powers than the earlier ones, it can be said that the success of a commission depends mostly on his personality and skill as a leader.

This could be seen in the presidencies of Walter Hallstein and Jacques Delors, who are still remembered as the most successful Commission Presidents since the existence of the Commission. A factor that also plays a major role in the successfulness of a President and in his authority is whether the Union is undergoing a positive or negative integration cycle. During a positive integration cycle, the Presidents tend to be stronger leaders. What can also be seen from history is that after a strong President, a weaker one tends to be elected. This can be seen by the fact that after the great Jacques Delors, Jacques Santer followed him in the position of the Commission President but never became as influential as Delors was. The Santer Commission will always be remembered as it had to resign nine months early in 1999. The current President, Mr. Barroso, is a rather weak leader, who had major difficulties during the financial crisis.

All in all, the President of the Commission nowadays has significantly more powers than the individual Commissioners; however it depends on how he uses these on whether he stands out of the group. It is commonly agreed that factors other than the legal basis determine the

⁸⁴ P. Kaczynski, *The European Commission 2004-09: A politically weakened institution?* (European policy institutions network, 2009), p. 8.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid, p. 9.

⁸⁸ John Bourn, *Financial Management in the European Union* (National Audit Office, 2009).

degree of influence a President has. Thus it is up to the individual person, whether he will be remembered as a *primus inter pares* or a true president.

THE IMPACT OF THE SANTER CRISIS ON THE FUNCTIONING OF THE EUROPEAN COMMISSION

Christina Siaw

1. Introduction

Of the institutions of the European Union the European Commission is the one, which has the monopoly over the right of initiative while also being charged with the responsibility of implementing or overseeing implementation of the legislation once it is made. This means that it stands at the beginning of the European legislative machinery as well as at its end. The Commission has always viewed its function as policy initiator as its primary role and has thus neglected its other functions. This has led to inefficiency and unaccountability. After many years of remaining unchanged the Santer crisis of 1999 finally provided the necessary political will in the Council of Ministers and the European Parliament for comprehensive change of the workings of the Commission. This paper aims to discover how these reforms have changed the way in which the Commission functions. It does so by focusing on the changes made by the introduction of Activity-Based Management, as here the reactions to the main criticism of lack of responsibility made in the first report of the Committee of Independent Experts are most easily visible. As the issue at hand regards the factual occurrence of events (i.e. the effects of the reform measures) this article is based on secondary academic literature that accounts for these events academically but also some based on empirical findings. First this article will look at the changes the Commission was to undergo, after which it will look at the way they were implemented. Finally it will make a judgment on how these implemented changes have affected the functioning of the Commission by looking at how they affected the function of the Head of Units and how the effect influences the functioning of the Commission as a whole.

2. What did the Reforms Following the Santer Crisis Entail?

The Santer crisis originated from allegations of mismanagement and culminated in the first report by the Committee of Independent Experts (CIE) stating that it is becoming difficult to find anyone [in the Commission] who has even the slightest sense of responsibility'.¹ The Council and the European Parliament charged the new Commission under Romano Prodi with the task of remedying the situation and to do so it was given an extensive reform mandate by them.² He then in turn delegated the task to his new second in command Vice-President Neil Kinnock, Commissioner for Administrative Reform, who skilfully designed the White Paper³ outlining all the changes that would be made and the timeframes by which they should be made.⁴ Due to this the subsequent reforms from 2000 up to 2004 are also called the Kinnock reforms. The White Paper was divided into three parts, the first of which contained the 'strategic guidelines' of the reform while the latter set out the 'action plan'.⁵ This action plan

¹ Committee of Independent Experts, 'First report on allegations regarding fraud, mismanagement and nepotism in the European Commission', http://www.europarl.europa.eu/experts/9_en.htm, section 9.4.25.

² H. Kassim, 'The Kinnock reforms in perspective: why reforming the Commission is an heroic, but thankless, task', *Public Policy and Administration* (2004b) 19(3), p. 28.

³ European Commission, *Reforming the Commission, A White Paper, Part I*, COM (2000) 200/final 2.

⁴ A. Ellinas, and E. Suleiman, 'Reforming the Commission: between modernization and bureaucratization', 15 *Journal of European Public Policy* 5 (2008), p. 710.

⁵ H. Kassim, 'A historic accomplishment. The Prodi Commission and administrative reform', in D.G.

contained 98 courses of action (divided into four headings) that needed to be put into practice, who was to do this and by what time.⁶ The four headings these 98 actions were divided into were: 'culture based on service'; 'priority setting, allocation and the efficient use of resources'; 'human resources development'; and 'organization of financial management'.⁷

The heading of 'culture based on service' was put into the White Paper because though the entire reform strived towards the creation of such a culture the idea was that it could not be realized without specific and comprehensive action directed at its creation.⁸ To do this the measures under this heading (e.g. a code of good behaviour) were to engrain the following five principles into the administration of the Commission: 'independence, responsibility, accountability, efficiency and transparency'.⁹

The second heading of 'priority setting, allocation and the efficient use of resources' was to tackle the problem that the Commission has limited resources and used them inefficiently.¹⁰ To do so the reform introduced the new method of Activity-Bases Management (ABM), which was supposed to lead to a better allocation of resources according to set priorities and a better way of monitoring activities of the entire Commission from a central point and better facilitating management and evaluation.¹¹ To accomplish this the Strategic Planning and Programming cycle (SPP) among other things was introduced. It commenced with an Annual Policy Strategy (ASP), which is finalized by the Collage¹² on the basis of negotiations that are to take place on de facto all levels of the Commission administration 'in a huge communication and coordination exercise'.¹³ This ASP is then translated by each Directorate General (DG) into an Annual Management Plan (AMP),¹⁴ stating which exact objectives they would be following in the coming year and the resources needed.¹⁵ Finally to complete the cycle the DGs prepare an Annual Activity Report (AAR), in which they evaluate all activities they have pursued and the money they have used for them during the year.¹⁶ This can then be used for the ASP for the year to follow.¹⁷

The third heading is 'human resources development'. The idea was that staff should be used in the most efficient way allowing the Commission to fulfil all of its potential with the limited resources that it had.¹⁸ This reform like the others covered many aspects of human resources such as career development and mobility of the workforce.¹⁹ Promotions in the Commission were based too much on seniority, which is why the Kinnock reforms introduced a system based more on merit. The old career structure is replaced with a one that consists of two interlinking function groups (that of the administrators and that of the assistants).²⁰ The location of an individual in either group or whether he/she passes from one to the next depends on the grade he/she is in (16 span across the two groups), which depends on the

Dimitrakopoulos (ed.), *The Changing European Commission*, (Manchester University Press, Manchester 2004), p. 44.

⁶ Ibid.

⁷ H. Kassim, in D.G. Dimitrakopoulos (ed.), *The Changing European Commission*, p. 44 – 46.

⁸ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 32.

⁹ Ibid.

¹⁰ H. Stevens, and A. Stevens, 'The Internal Reform of the Commission', in D.B. Spence and G. Edwards (eds), *The European Commission*, (John Harper, London 2006), p. 464.

¹¹ H. Kassim, in D.G. Dimitrakopoulos (ed.), *The Changing European Commission*, p. 45.

¹² H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 33.

¹³ M. W. Bauer, 'Impact of administrative reform of the European Commission: results from a survey of heads of unit in policy-making directorates', 75 *International Review of Administrative Sciences* 3 (2009), p. 461.

¹⁴ H. Stevens, and A. Stevens, (2006), p. 465.

¹⁵ M. W. Bauer, 75 *International Review of Administrative Sciences* 3 (2009), p. 461; Mildenstein (2009), p. 66.

¹⁶ Ibid.

¹⁷ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 33.

¹⁸ H. Kassim, in D.G. Dimitrakopoulos (ed.), *The Changing European Commission*, p. 45 – 46.

¹⁹ Ibid, p. 46.

²⁰ H. Stevens, and A. Stevens, (2006), p. 475.

number of points he/she has accumulated, but in case of the latter he/she would also have to pass an examination.²¹

Finally there is the heading of ‘organization of financial management’, which more or less originated from the second report of the CIE.²² Many things were changed under this heading such as ‘a separation of authorisation, financial control and auditing functions’²³ among other things due to the creation of three new bodies ‘the Internal Audit Service, the Audit Progress Committee and the Central Financial Service [as well as the introduction of] internal audit capabilities created in each DG, and internal control standards’.²⁴ In addition the AAR implemented under the heading of ‘priority setting, allocation and the efficient use of resources’ also plays a role as it insures financial accountability of the Directors General for the financial transactions they authorize. This is because it also contains a signed declaration stating that the Director vouches ‘for the correct use of all budgetary resources for which the DG has been responsible’. If the Director does not vouch for something he/she must justify this.²⁵ This meant that the financial controls, which before were exercised *ex ante* by requiring three different people to sign off on any one transaction,²⁶ were to be replaced by this form of *ex post* controls, which are decentralized.²⁷

The first APS was finalised in February 2002 setting the priorities for the following year.²⁸ The first AARs were finished in 2001. The SPP was up and running in 2003. This allowed the budget setting for 2004 to be the first utilizing a fully functional SPP cycle and abiding by the concept of Activity Based Budgeting.²⁹ At the onset of the year 2004 the Commission announced that 95 out of the 98 actions of the White Paper had been implemented.³⁰ So one can say that enough time has gone by that one should be able to see some effects of the reforms. To examine these this article will look at the effects of the implementation of ABM and SPP and its effects on how the way the Commission functions now differs from before the reforms.

3. *How AMB and the SPP Cycle Impact on the Functioning of the Commission*

This question is a difficult one to answer, as the Commission is a large and complex body. To answer this question this paper will first look at how the implementation of the SPP affects the functions of the Commission staff. How it changed their day-to-day work. Then it will look at how this change affects the functioning of the Commission as a whole.

3.1 The effects of AMB and the SPP cycle on the staff of the Commission

Naturally it makes sense that such a measure, which is implemented Commission wide has effects on all staff members. It would however go far beyond the frameworks of this paper to examine the effects it has on all of them. For this reason this paper will focus on how it affects the Heads of the units (HoU) within the Commission, examining what their role or main function used to be before the Kinnock reforms and what it has become.

Bauer, the HoU, was the key individual when it came to the development of legislative

²¹ Ibid.

²² H. Kassim, in D.G. Dimitrakopoulos (ed.), *The Changing European Commission*, p. 46.

²³ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 34.

²⁴ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 35.

²⁵ H. Stevens, and A. Stevens, in D.B. Spence and G. Edwards (eds), *The European Commission*, p. 466 – 467.

²⁶ Ibid, p. 466.

²⁷ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 34.

²⁸ H. Stevens, and A. Stevens, (2006), p. 465.

²⁹ H. Kassim, 19 *Public Policy and Administration* 3 (2004), p. 35; H. Stevens, and A. Stevens, (2006), p. 465.

³⁰ Ibid, p. 34.

proposals the Commission College should make. He described their position within the Commission as a ‘pivotal’ one. He bases this claim on the argument that as a so-called middle manager the HoU possesses the necessary in-depth and first hand experience and knowledge of all the elements of the mechanisms of the Commission that are required to draft and guide a proposal into realisation. He lists these elements as including not only the official channels and methods. He, however, also knows his way around the informal hierarchy of the Commission as well as the workings of the ‘crucial policy pundits’ of the other institution of the Union as well as those of the national governments and the lobby groups that play a role in the issues his unit is working on. In addition to this the fragmentation and lack of communication and the resulting lack of coordination within the Commission structure means that HoU occupies one of the few positions (if not the only one) where all the facets and different aspects of proposal development come together. This fragmentation of the Commission is supported by Christiansen, who paints a picture of a Commission, which is not only divided horizontally between DGs for example but also vertically between the College and the staff.³¹ His argumentation is accepted as sound by this paper and it takes for granted that the HoU occupies this important position within the Commission.

In addition the HoU is the connection between the team of experts that work under him/her and the ‘politicized’ players occupying the hierarchical space above him/her all the while maintaining contact with relevant expert communities outside the Commission framework. Once again Bauer indicates that the HoU occupies an important focal point. Bauer assesses that it is more often than not the HoU who is charged (by his position) with the task of drafting policies and shepherding them through to realisation (which would make him a rapporteur), which is a time-consuming one at that.³² This paper agrees with this position, which is also supported by the fact that the higher individuals are in the hierarchy the more politicized their position becomes.³³ The relative position of the HoU in the middle of the Commission hierarchy would imply that it does indeed function as a connection between the level consisting of experts who did the research and grunt work to devise a proposal and those in more politicized positions that have the necessary authority and clout required to help a proposal through the Commission mechanisms.

So much for the role they had previously occupied, but what has the introduction of the ABM and the SPP cycle turned them into? Bauer answers this question quite gloomily. He argues that the decentralisation of management tasks has hit the HoU the hardest as he argues that they are the ones that play a major role in the implementation of this managerial change. As a result he found that the day-to-day life of the HoU has changed significantly from main rapporteur of the Commission to manager.³⁴

“Writing proposals for policy objectives, conceiving (measurable) progress and quality indicators, conducting impact assessment exercises, suggesting priorities, drafting respective reports, evaluating and communicating decisions to the rank and file have become the bread and butter of the HoU’s daily job.”³⁵

As was mentioned above the task of acting as a rapporteur is very time consuming and extensive, but now with the implementation of the ABM method and the SPP cycle so are the

³¹ The information in this paragraph is drawn from: M. W. Bauer, ‘Diffuse anxieties, deprived entrepreneurs: Commission reform and middle management’, 15 *Journal of European Public Policy* 5 (2008), p. 694 – 695; the information of the last sentence is drawn from: T. Christiansen, ‘Intra-institutional politics and inter-institutional relations in the EU: towards coherent governance?’, 8 *Journal of European Public Policy* 5 (2001), p. 751.

³² The information in this paragraph is drawn from: M. W. Bauer, 15 *Journal of European Public Policy* 5 (2008), p. 694 – 695.

³³ A. Ellinas, and E. Suleiman, 15 *Journal of European Public Policy* 5 (2008), p. 716.

³⁴ M. W. Bauer, 15 *Journal of European Public Policy* 5 (2008), pp. 696 – 697.

³⁵ Ibid, p. 696.

tasks of a manager, which in contrast to the prior is one the HoU is now officially charged with. This would mean that the HoU's former main activity of policy development must now take a step back and make room for the HoU's new managerial priorities. Bauer illustrates this change through one statement made in his survey of HoUs in 2007 when asked to generally comment on the reforms. He says: 'Before the HoU were experts in their fields, now they are "managers"'.³⁶ It has now become evident that the de facto function of the HoU has shifted or rather that the HoU's role in the Commission mechanism has changed. This leaves one to wonder what effects this has on the functioning of the Commission as a whole as the HoU had occupied such an important position in the policy development process.

3.2 The Effect of the Changed Functions of the HoU on the Functioning of the Commission as a Whole

Bauer argues that this change in the role of the HoU results in managerial duties that dominate his/her workload to the extent that it constrains their ability to devote time and energy to policy development.³⁷ He thus draws the conclusion that due to the fact that this important player in the policy development process has now been taken out of the game, the result will be a void which will weaken said process.³⁸

On the other hand the findings of Schön-Quinlivan, who examined the application of the reforms in the different DGs, is of the opinion that the reforms are not necessarily as confining for the staff as Bauer makes it look.³⁹ Her findings show that the different DGs implemented and approached the reforms differently depending on three essential factors. First the organizational context of the individual DG, which consists mainly of two important hallmarks: the way it is governed internally and the way its financial system is set up. The second factor is the power struggles the different DGs are finding themselves fighting. The final factor is the leadership the different Director-Generals display.⁴⁰ From her findings she concludes that, whilst acknowledging that the new reforms have resulted in time-consuming procedures that impose a substantial additional amount of work on the HoUs, the difference in application of the reforms in the different DGs in her opinion means that there is wiggle room for the different DGs to apply the reforms to suit them.⁴¹ She does not elaborate how this would decrease the work load, but judging from the gist of her article this paper assumes that she is implying that if it was a need of those DGs charged with policy making that their HoUs not be too overloaded with management tasks they would find a way of remedying this. For example by introducing electronic help mechanism as she found the DG REGIO has done to improve efficiency and thus decreases the workload.⁴²

Bauer uses the critical comments of the people he has surveyed to back his claim. It is the objectiveness and value of this foundation that Schön-Quinlivan questions, when she states that the first reaction to change is fear culminated by the fact that one now would have to bear the additional burden of accountability and financial responsibility.⁴³ It is thus to be assumed that she attributes the many dramatic comments made in Bauer's survey to this fear. One of these dramatic statements refers to the reform as a 'castration'.⁴⁴ After this initial fear has subsided, she claims, the staff would use the reforms to their advantage namely as proof of the

³⁶ M. W. Bauer, 75 *International Review of Administrative Sciences* 3 (2009), p. 466; Translation by Thom Kyll.

³⁷ M. W. Bauer, 15 *Journal of European Public Policy* 5 (2008), pp. 702 -703.

³⁸ Ibid, p. 703.

³⁹ E. Schön-Quinlivan, 'Implementing organizational change – the case of the Kinnock reforms', 15 *Journal of European Public Policy* 5 (2008), p. 740.

⁴⁰ E. Schön-Quinlivan, 15 *Journal of European Public Policy* 5 (2008), p. 736.

⁴¹ Ibid, p. 740.

⁴² Ibid, p. 733.

⁴³ E. Schön-Quinlivan, 15 *Journal of European Public Policy* 5 (2008), p. 740.

⁴⁴ M. W. Bauer, 75 *International Review of Administrative Sciences* 3 (2009), p. 466.

legitimacy of their workings and projects, even addressing the possibility that the new reforms could in fact increase the quality of the policies the Commission develops.⁴⁵

Leaving the field wide open Schön-Quinlivan also addresses the possibility that the reforms change the role of the Commission into one avert to engaging in policy-making and the Council filling the void it leaves.⁴⁶ The desirability of such a development is questionable. As so far the Commission has brought the element of supranationality to the policy-making process, the loss of which to the more intergovernmental Council would be a sad one. However a lot would have to change first in the Commission before such an outcome would occur on the basis of inability or interest by the Commission to engage in policy-making. (Note that this statement is restricted to the Commission causing this outcome, it carries no judgment on how the other institutions informally encroach in the position the Commission occupies in the policy-making process.) This statement is based on the simple fact that the Commission's role in the policy-making process has since its creation been regarded by its members as its most important task.⁴⁷ Thus all possibilities to fulfil this task itself would probably first have to be exhausted before it surrenders this responsibility to any other institution.

This paper agrees with both Bauer and Schön-Quinlivan to certain extents. It agrees with Bauer in that the new reforms have shifted attention more towards the efficient management of the projects the Commission has been running at the expense of its capacity to develop new ones. Thus it agrees that the HoUs now have much less time compared to before the reforms to engage in the policy-making process. However the extent of this effect is arguable. It is at this juncture at which this paper follows Schön-Quinlivan's line of reasoning in that it agrees with her conclusion that the DGs have the possibility of applying the reforms in a way that is best suited for them. Thus this paper argues that if it is the need of a policy-making DG to not have the reforms infringe on its ability to make said policies then it will strive to apply them accordingly, which according to Schön-Quinlivan's study is possible to some extents. This paper thus argues that, whilst assuming the HoU of the policy-making DGs have had this pivotal role in the policy-making process, the respective DGs have the ability to apply the reforms in a way that the HoU's policy-making capacity is least infringed or find ways in which they can develop new policies despite the HoU's limited ability to contribute.

Schön-Quinlivan also calls into question the extent to which Bauer's surveyed HoUs claim they are being constrained by this reform as mentioned above, attributing their reactions to fear and not considering them objective factual statements of which one could draw an accurate assessment of the reform effects. This point is arguable. Though this paper agrees with the assessment that it is human nature to react negatively and to extents irrationally fearful to change, as the Commission staff has done many times in the past thus squashing previous reforms together with the unions.⁴⁸ However she describes this and this paper believes this to be an initial reaction, which after time will give way to a more accurate assessment, which begs the question how much time needs to pass before this accurate assessment can be made? The interviews were conducted in 2007, which means that about three years had gone by since the ABM method and the SPP cycle had been implemented. So one could conclude that experience had been gathered and arguably by the time the survey had been made the HoUs had already reached this point where they could make accurate accounts of the effects of the reform. This paper finds that the amount of time that has passed is sufficient to make such an assessment.

However this paper also finds that the way the survey was conducted also puts into question the value of its outcome. Out of the 800 HoUs that were identified by Bauer as 'exclusively

⁴⁵ E. Schön-Quinlivan, 15 *Journal of European Public Policy* 5 (2008), p. 740.

⁴⁶ Ibid.

⁴⁷ M. W. Bauer, 15 *Journal of European Public Policy* 5 (2008), p. 694.

⁴⁸ H. Stevens, and A. Stevens, in D.B. Spence and G. Edwards (eds), *The European Commission*, pp. 458 – 461

[dealing with] policy tasks', he interviewed 116, yet he mentions no criteria or attributes of them that would allow one to assess the value of each statement.⁴⁹ An informative attribute would have been how long they had been HoU as one would expect those who had been in this position longer would be more prone to mourn the loss of the prestigious role of rapporteur, and those recently or not so long in the position would be expected to adapt quicker to the change. In addition it would have been informative to see whether the surveyed HoUs had been part of the 500 middle managers that had taken management classes in 2003,⁵⁰ or had taken them subsequently. Perhaps this would have shed some light on how much they resisted becoming a manager or how efficient one could assume they were working and applying the new managerial reforms. Without such criteria or idea of who the surveyed were and what their motivations for giving the responses that they gave, one is left clueless as to whether the ones, who chose to respond to this survey assessing the effects of the reform were those that wanted to vent or let their frustration be heard or whether they were a balanced and diverse mix of individuals capable of representing the remaining seven-eighths of policy tasked HoUs.

With all of the before mentioned aspects and considerations in mind this paper finds the bottom line of the whole discussion to be inconclusive. Yes, the focus of the Commission staff was forced to shift more towards the responsible and efficient administration of the tasks and project at hand at the expense of the Commission's capacity to develop new policies and projects. How one evaluates this shift of focus depends on how one values the different functions of the Commission. If one prioritizes its function as policy initiator over its function as the overseer of the implementation and proper administration of the policies and projects it has already successfully initiated, one would think the reforms were damaging and incapacitating the main function of the Commission. In contrast, if one would prioritize the latter over the former one would find that the reforms had been overdue and enhanced the Commissions ability to fulfil its function effectively.

This paper finds that both functions are of substantial value, though the prior admittedly more important, as the Commission if not alone responsible for the implementation of projects and policy as these responsibilities are also carried by the Member States. It is of the opinion that in the past not sufficient value had been accredited to the latter function, as a successful proposal for a new project is worth little if the project is not implemented and managed properly. What it boils down to is striking the right balance between the two functions of the Commission, which the reforms have attempted to do by attempting to remedy the lack of efficient management. This means that the appropriate question to ask is whether the reforms have managed to strike the right balance. This would in this paper's opinion only be definitely answered by another Santer-like crisis, which would point at either a lack in management of qualitative/quantitative policy output of the Commission. Another way could be to define indicators and then examine the output of the Commission since 2004, looking for any kind of change, be it deficiencies or improvements. However, defining such indicators is a very difficult task as they would have to be able to distinguish between the influences of the reform and those brought about by the added complexity the latest enlargement of the union contributed to the policy-making process, which could also account for a lack of out-put.

4. Conclusion

This paper has come to the conclusion that the Kinnock reforms, and more specifically the introduction of ABM and SPP, influenced functioning of the Commission in that they shifted their focus more towards the Commission's function as the administrator of the Union and the

⁴⁹ M. W. Bauer, 15 *Journal of European Public Policy* 5 (2008), p. 698

⁵⁰ A. Ellinas, and E. Suleiman, 15 *Journal of European Public Policy* 5 (2008), p. 713

managerial duties that come with such a function. Using the HoU's change in function as an indicator one can see this shift. However it has come at the cost of the HoU's capacity to act as rapporteur thus an important actor has to some degree been taken out of this process leaving a void. How much or if at all this void will actually affect the quantity or quality of policies of the Commission that have since or will be developed is still to be seen. How one would assess the reforms at this point would depend on how much weight one gives to the two functions of the Commission. The change was however overdue as the function of the Commission as policy implementer and overseer has been unjustifiably neglected in the past.

THE ECONOMIC AND SOCIAL COMMITTEE: USEFUL DEFENDER OF CIVIL SOCIETY?

Marvin Hennes

1. Introduction

In 2007, fifty-seven members of the European Parliament called for an abolition of the European Economic and Social Committee, stating that it has outlived its usefulness in the European institutional set up – by strengthening corporatism and duplicating the Parliament's work without a democratic mandate.¹

Set up as an advisory body within the institutional structure of the European Union – representing socio-economic interest groups and civil society – the Economic and Social Committee, since its creation, sought for a definition of its proper role. Whereas it was believed in early days of the EEC that the Committee would serve as a representative of interest groups in the decision-making process, those expectations turned out to be unrealistic because of its mere advisory role and diffuse position in the institutional set-up. In recent years however, the Committee was able to increase its visibility and influence, using the discourse on civil society.

In the following, I will address the search for a proper role of the Economic and Social Committee, by analysing the Committee's change of role in the history of the European Union and the influence of the discourse on civil society. In order to do so, I will first give a brief introductory description of the present role of the Economic and Social Committee, its composition and competences. I will continue by analysing the initial role of the Economic and Social Committee set out in the Rome Treaty and its subsequent development until the early 1990's. Then, I will place the role of the Committee in the context of the discourse on civil society, analysing its origin and influence on the role and working methods of the Committee. Finally, I will conceptualize the new role of the European Economic and Social Committee as a forum of civil society within the institutional set-up.

2. Composition and Competences of the European Economic and Social Committee

The European Economic and Social Committee (EESC)² is an advisory body of the European Union, representing organizations of employers, the employed and other parties representative of civil society, particularly in socio-economic, civic, professional and cultural areas.³

Composed of 344 members, who are appointed for a five-year renewable term, it is divided into three groups of various economic and social activities:

(1) Employers organisations, comprising representatives from both the private and public sector; (2) trade unions and associations; (3) 'various interests', comprising representatives of small and medium businesses, socio-economic organizations, consumer and environmental organizations, professions, crafts and agricultural organizations.⁴ Members of the Committee are proposed by the Member States, which decide by various means which candidate members are to be appointed, e.g. by socio-economic interests (France and Greece), through

¹ European Parliament, 'Written Declaration pursuant to Rule 116 of the Rules of Procedure by Nils Lundgren and Hélène Goudin on the abolition of the Economic and Social Committee', 0078/2007.

² Formerly: Economic and Social Committee (ESC).

³ Art. 300(2) TFEU.

⁴ A. El-Agraa and B. Ardy, *The European Union: Economics and Policies*, (Cambridge University Press, 2011), p. 57 - 58.

national social and economic councils (Belgium and the Netherlands) or by appointment of government departments, such as the Federal Ministry of Economics and Technology in Germany or the Foreign and Commonwealth Office in the United Kingdom.⁵

Members of the EESC do not act as delegates of their Member State, but are to represent an abstract socio-economic category, independent in performance and not bound by any mandatory instruction.⁶

Competences are defined in Article 304 TFEU, stating that the Committee shall be consulted by the European Parliament, the Council or by the Commission in cases where the Treaties provide so. The Compulsory consultation amounts to about 50 articles in the Treaties, involving a wide range of policy areas, *inter alia* the free movement of goods, industrial, environmental and agricultural policy, education and public health.⁷ The Commission, the Council and the European Parliament may also ask the Committee for an opinion whenever they consider it appropriate. Moreover, the Committee may under the provision issue its own-initiative opinions, i.e. to influence the Commission when drafting a proposal.

3. *Inception and Initial Role of the Economic and Social Committee*

The roots of the Economic and Social Committee can be traced back to the neo-functionalist theory of integration, build upon the works of Ernst B. Haas and Leon Lindberg. In their pluralist perception of international politics, greater emphasis was given to the role of non-state actors in the policy-making process.⁸ In their view, interest groups concerned would organize across national boundaries, making contact with similar groups in other countries (a term later called transnationalism), in order to be able to influence the policy-making process. This group pressure would eventually spill over into the federal sphere, stimulating the process of integration.⁹

Whereas the creation of an institution representing socio-economic interests seemed self-evident in the European Coal and Steel Community, a proposal to create a socio-economic committee within the institutional set-up of the upcoming, more wide-ranging European Economic Community was only made at the final stages of the Intergovernmental Conference on the Common Market and EURATOM in September 1956.¹⁰ The proposal received resistance from Germany, particularly because of their experience with the *Reichswirtschaftsrat* and corporatism in the Weimar Republic, still the creation of an advisory socio-economic committee was advocated by the other five founding members who already had similar bodies at a national level.¹¹ Following the creation of the European Economic Community, the Economic and Social Committee was formally established under Article 193 of the EEC Treaty.

Yet, the Treaty of Rome was the corollary for the Committee's obscure role. While it was first expected that the ESC would serve as a representative body acting on behalf of interest groups, contributing to a closer cooperation between the institutions of the EEC and the various economic sectors, the Committee proved to be ineffectual and in its role not

⁵ Smismans, 'The European Economic and Social Committee: Towards Deliberative Democracy via a Functional Assembly.' 4 *European Integration Online Papers (EIoP)* 12 (2000), p. 2.

⁶ Art. 300(4) TFEU.

⁷ Smismans, 12 *European Integration Online Papers (EIoP)* 4 (2000), p. 2.

⁸ I. Bache and S. George, *Politics in the European Union*, (Oxford University Press, 2006).

⁹ E. Haas, *The Uniting of Europe; political, economic and social forces, 1950-1957*, (Stanford University Press 1958).

¹⁰ Smismans, 12 *European Integration Online Papers (EIoP)* 4 (2000), p. 4.

¹¹ J. Lodge and V. Herman, 'The Economic and Social Committee in EEC decision-making.' 34 *International Organisation* 2 (1980), p. 267.

comparable to other economic and social committees on a national level.¹² The Treaty of Rome curbed the power of the Committee, making it impossible to exert influence over the decision-making process. Article 198 (1) of the Treaty restricted the Committee's advisory power to compulsory and optional consultations after the actual drafting of proposals.¹³ Consequently, the Committee's opinion was mostly sought when amending draft proposals and questions on highly technical subjects.¹⁴ There was no mechanism provided in the Treaties that would ensure that the Committee's opinions would be respected, as most of the times the opinions would face disinterest of the EEC institutions because of their individual, rather than delegated nature.¹⁵

After several unsuccessful attempts to gain a right of legislative initiative in the late 1960's, the Committee, in 1972, eventually obtained the right to advise on its own initiative on all matters on all policy areas affecting the EEC.¹⁶ The German government, which formerly resisted the creation of the Committee and an extension of its powers, now under Chancellor Willy Brandt, supported the Committee's desire to become a forum of dialogue between interest groups and EEC institutions.¹⁷ Ultimately, the Committee gained the power to influence draft regulations, directives and decisions, once curbed by Article 198(1). Yet from a practical viewpoint, the influence of the Committee in policy-making remained minimal. Between 1978 and 1990, own-initiative opinions only amounted to 15 per cent of all three types of consultation, while compulsory consultation amounted to 36 per cent and optional consultation to 49 per cent.¹⁸ Moreover, the Committee still faced the same problems prior to gaining the power of an own-initiative opinion. No mechanism ensuring the respect for opinions stated by the Committee existed, neither did a change of its appointment procedure occur.

4. *The Discourse on Civil Society and an Appropriate Role for the Committee*

The term 'civil society' within the context of the European Union originated in the beginning of the 1990's, when debates arose about transparency of the European Union and its institutions, initiated by the Birmingham declaration.¹⁹ The first approach was taken by the European Commission, which in its policy paper 'An open and structured dialogue between the Commission and interest groups',²⁰ proposed to strengthen the ties with interest groups, by introducing *inter alia* a directory and a code of conduct for special interest groups. These interest groups were not only of professional nature, but also included welfare associations, whose importance was already stressed in Declaration 23 of the Maastricht Treaty.²¹ At the same time, the Economic and Social Committee was facing the risk of marginalization with

¹² Ibid, p. 269.

¹³ Article 198 (1) of the Treaty Establishing the EEC reads: 'The Commission shall be consulted by the Council or by the Commission in the cases provided for in this Treaty. The Committee may be consulted by these institutions in all cases in which they deem it necessary.'

¹⁴ Lodge and Herman, 34 *International Organisation* 2 (1980), p. 269.

¹⁵ Ibid, p. 269.

¹⁶ The procedure was informally adopted in Art. 20 (4) of the ESCs old rules of procedure. (Now Rule 29 (2) of the new rules of procedure of July 2010).

¹⁷ Lodge and Herman, 34 *International Organisation* 2 (1980), p. 275.

¹⁸ W.J. Van der Voort, *In Search of a Role. The Economic and Social Committee in European Decision Making*, PhD Thesis (Utrecht, 1997).

¹⁹ European Council, 'Birmingham 16 October 1992 Presidency Conclusions', DOC/92/6.

²⁰ European Commission, 'An open and structured dialogue between the Commission and interest groups' [1993] O.J. 93/C 63/02.

²¹ Declaration 23 reads: 'The Conference stresses the importance, [...] of cooperation between [the European Community] and charitable associations and foundations as institutions responsible for social welfare establishments and services.'

the creation of the Committee of Regions and the shift of emphasis on the social dialogue independent from the Committee.²² Inspired by the debates about transparency and democratic deficit in the early 1990's, it changed its focus from socio-economic interest representation to the representation of the European citizen. The attempt to reposition itself *vis-à-vis* the European citizen scarcely succeeded, mainly because of its bad organized, broad and top-down focused method of work.²³

In 1998, a new approach was taken by the incoming Secretary General and President of the Committee, Patrick Venturini and Beatrice Machiavelli. By acknowledging the problem of marginalization the Committee was facing – even after an attempt to redefine itself *vis-à-vis* the European citizen – they saw their chance in redefining the role of the Economic and Social Committee as a forum of civil society, shifting the focus from individual to organized citizen.²⁴ The Committee's own-initiative opinion 'The role and contribution of civil society organizations in the building of Europe'²⁵ served as the starting point of this initiative. In its opinion, the Committee discusses the notion of civil society throughout the history, from Aristotle and Cicero over Hegel and Marx to modern interpretation of civil society by Tocqueville, Durkheim and Weber, who based civil society on four principles: (1) Civil society is typified by more or less formalized institutions; (2) Individuals are free to choose whether to belong to civil society institutions; (3) The framework of civil society is the rule of law; (4) Civil society is the place where collective goals are set and citizens are represented.²⁶ The Committee defines civil society as 'a collective term for all types of social action, by individuals or groups, that do not emanate from the state and are not run by it'. Civil society organizations are defined as 'the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens.' The Committee uses an inclusive definition of civil society, including social partners, organizations representing social and economic players; community based organizations (CBOs), e.g. youth organizations and family associations; religious communities; non-governmental organizations (NGOs), e.g. environmental organizations, human rights organizations, consumer associations etc. Arguing that in its role as forum of civil dialogue, the Committee guarantees the implementation of the participatory model of civil society, enabling the latter to participate in the decision-making process and reduce the democratic deficit.²⁷

It is no surprise that the Committee sought to legitimize its institutional position and combat marginalization using the discourse on civil society and civil dialogue, given the emergence of a debate on the participation of civil society in the decision-making process.²⁸ The debate was initiated by several factors, *inter alia*, larger protest movements (in particular anti-globalization movements)²⁹, decisions of the ECJ relating to the funding of social projects³⁰ and the resignation of the Santer Commission after a scandal of financial mismanagement and fraud. The entire debate culminated in the White Paper on European Governance, published

²² Smismans, 'European Civil Society: Shaped by Discourses and Institutional Interests', 9 *European Law Journal* 4 (2003), p. 491.

²³ Smismans, 'An Economic and Social Committee for the Citizen, or a Citizen for the Economic and Social Committee?', 5 *European Public Law* 4 (1999), p. 556-581.

²⁴ Machiavelli, 'The role of civil society in European integration', 1 *Journal of Public Affairs* 1 (2001), 33-37.

²⁵ Economic and Social Committee, opinion on 'The role and contribution of civil society organisations in the building of Europe', CES 851/1999.

²⁶ Machiavelli, 1 *Journal of Public Affairs* 1 (2001), p. 34.

²⁷ Ibid.

²⁸ Saurugger, 'The Social Construction of a Participatory Turn: The Emergence of a Norm in the European Union', 49 *European Journal of Political Research* 4 (2010), p. 480.

²⁹ Smismans, 9 *European Law Journal* 4 (2003), p. 487.

³⁰ Case C-106/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1996].

by the European Commission in 2001.³¹ In its commitment for better involvement, greater consultation, transparency and stronger mobilization of civil society, it follows the reasoning of the Committee given in the 1999 opinion ‘The role and contribution of civil society organizations in the building of Europe’, placing emphasis on the participatory model of civil society in the decision-making process in order to legitimize European policy and combat the democratic deficit.³² The Nice Treaty took into account the new role of the Economic and Social Committee, changing the Treaty provision on the composition of the Committee to: ‘The Committee shall consist of representatives of the various economic and social components of organized civil society’.³³

5. A Proactive Forum of Civil Society?

With its new role defined in the Nice Treaty, the Committee changed its Rules of Procedure in 2002 and adopted a Members’ Statute of the European Economic and Social Committee in 2003. In 2004, the Big Bang enlargement resulted in an increase of seats in the Committee. 122 new seats were allocated to representatives from the new Member States, an increase of more than 50 per cent. Whereas it was argued that decision-making after the enlargement became less smooth, the enlargement proved to be an added value in the legitimization of its institutional role.³⁴ In most of the new Member states, civil society was still considerably weak. Low levels of organizational membership, participation in associational life and trust in organized civil society organizations resulting from their communist past proved to be a challenge both for the Committee and the New Member States to foster civil dialogue and the awareness of civil society.³⁵

Not only did the Committee try to combat marginalization and increase its visibility by virtue of giving itself a new role, it also endeavoured to play a more proactive role in the decision-making process — particularly in its early stages — and enhance its external relations. The Committee hence adopted several vertical and horizontal instruments since the early 1990’s to achieve this goal.

5.1 Single Market Observatory

The Single Market Observatory (SMO), set up in 1994 at request of the European Parliament, the Commission and the Council, is an instrument of the Committee to evaluate and assess the state of affairs of the single market. Recently, it also promotes smart regulation within the EU, i.e. the setting up of databases and endorsement of new ways of regulation. By organizing hearings, it serves as an important instrument when drafting own-initiative opinions relating to the single market.^{36 37}

³¹ Saurugger, 49 *European Journal of Political Research* 4 (2010), p. 480.

³² European Commission, ‘European Governance: A White Paper’, COM(2001) 428.

³³ Art. 300(2) TFEU (ex. Art. 257 TEC).

³⁴ Pérez-Solorzano and Smismans, ‘The European Economic and Social Committee after Enlargement’ in E. Best (ed.) *et al.*, *The Institutions of the Enlarged European Union*. (Edward Elgar, 2008) p. 212-247.

³⁵ Ibid.

³⁶ European Economic and Social Committee, ‘The Single Market Observatory of European Economic and Social Committee’. Retrieved on 5 December 2011.

http://www.eesc.europa.eu/resources/docs/ppt_smo_en_17112010.pdf

³⁷ Pérez-Solorzano and Smismans, *The Institutions of the Enlarged European Union*. (2008), p. 212-247.

5.2 Exploratory Opinions

In 2001, the Committee introduced the instrument of the so-called ‘exploratory opinion’ to further influence the European Commission in early stages of the decision-making process. While technically they can be own-initiative opinions, they Committee uses informal ways to prevail upon the Commission to ask for exploratory opinions.³⁸

5.3 Joint Consultative Committees

Joint Consultative Committees (JCC) are the Committee’s most important instrument in enhancing external relations with third countries and applicant states, by fostering awareness of civil society within the country and strengthen the links with civil society organizations before the accession of the future EU member.³⁹ This is done by the setting up of a joint body of civil society representatives, composed from the equal number of European Economic and Social Committee delegates and civil society organization delegates from the applicant state. Initiatives of the JCC are *inter alia* fact-finding missions to candidate countries, training seminars and hearings.⁴⁰

5.4 Consultative Commission on Industrial Change

The Consultative Commission on Industrial Change (CCMI) was created in 2002 within the framework of the Committee, when it was decided to continue the work of the European Steel and Coal Community’s Consultative Committee – facing the expiry of the ECSC treaty.⁴¹ A continuation of its work would not only permit the retention of expertise build up in the past 50 years, but would also cover all issues relating to industrial change – a challenge faced by many of the New Member States. Consequently, the CCMI is widely used by the Committee to draw up opinions and play a proactive role in this area.⁴²

Within the ambit of its role as forum of civil society, the Committee increasingly committed itself to play a more proactive role in its advisory function through the use of vertical instruments, such as exploratory opinions and the Single Market Observatory. Comparing the usage of own-initiative opinions between 1979 – 1990 and 2005 – 2006, an increase of 10 per cent can be noted. Whereas in the former time period, own-initiative opinions amounted to 15 per cent of all issued opinions⁴³, the figure rose to 25,94 per cent in the latter.⁴⁴ Horizontal instruments such as the Joint Consultative Committees and the Consultative Commission on Industrial Change complemented these vertical instruments by widening the area of activities and influence of the Committee, enhancing external relations and fostering awareness of civil society and civil dialogue, benefitting from the accession of 10 new Member States in 2004. With its more proactive role, the Committee shifted its focus from an output method of work – providing expertise to legislative bodies of the EU – to an input method of work – emphasizing its deliberative character and enhancing links with civil society.⁴⁵

³⁸ Ibid.

³⁹ Smismans, 12 *European Integration Online Papers (EIoP)* 4 (2000), p. 9.

⁴⁰ Pérez-Solorzano and Smismans, *The Institutions of the Enlarged European Union*. (2008),) p. 212-247.

⁴¹ European Economic and Social Committee: ‘The Consultative Commission on Industrial Change (CCMI)’. Retrieved on 5 December 2011. <http://www.eesc.europa.eu/resources/docs/eesc-2005-013-en.pdf>

⁴² Pérez-Solorzano and Smismans, *The Institutions of the Enlarged European Union* (2008),) p. 212-247.

⁴³ W.J. Van der Voort, *In Search of a Role. The Economic and Social Committee in European Decision Making* (1997).

⁴⁴ Pérez-Solorzano and Smismans, *The Institutions of the Enlarged European Union* (2008), p. 212-247.

⁴⁵ Smismans, 9 *European Law Journal* 4 (2003), p. 496.

6. *The Concept of a Forum of Civil Society within the Institutional Set-Up*

A certain tension exists between the notion of civil society and the institutional role of the European Economic and Social Committee, which has several reasons. Firstly, governments of the Member States still appoint the members of the Committee. While they act independently from their Member State, the diffuse appointment procedure lacks the representation and influence of civil society organizations. Secondly, compulsory and optional consultation still take the majority of the Committee's agenda, considering the fact that own-initiative and exploratory opinions only amount to 26 per cent of all issued opinions.⁴⁶ Although the Committee's proactive role increased with the use of new vertical and horizontal instruments, it can be argued whether the Committee could achieve the required level of proactivity that civil society would require.⁴⁷ Thirdly, representation of civil society within the European Union is still highly fragmented and scattered across the whole system of EU governance, reaching from ad-hoc lobby groups to highly organized associations. Moreover, inherent difficulties lie in the own nature of civil society at a transnational level. By organizing itself in larger, transnational structures; by developing strategies within these structures autonomously from its constituent members, thus by jumping instead of bridging the gap between society and transnational structures of governance, lies the risk that voices of national civil society actors rest unheard or become lost in the process.⁴⁸ In terms of conceptualizing the role of civil society within the complex structure of European governance and multi-level polity, the Committee failed (or only did so inadequately) to recognize the role of civil society in intergovernmental policy areas, i.e. justice and home affairs. While it uses the discourse on civil society to legitimize Community governance with the European Commission as the main player in drafting proposals, it fails to value the role of civil society where participation could compensate the lack of parliamentary involvement.⁴⁹

Hence, even after redefining the role of the Committee in new rules of procedure and amendments in the Nice Treaty, ambiguity about the role of the Committee as a forum of civil society still exists and not all factors completely adapted to the new role of the Committee as forum of civil society. Yet, these issues did not hinder the Committee to increase its influence and gain a firm foothold within the EU institutional set-up. Using the discourse on civil society to legitimize its institutional role, the other institutions acknowledged the Committee's role in the decision-making process, i.e. the European Commission in the White Paper on European Governance⁵⁰ and the European Parliament in its resolution on the White Paper, calling the Committee 'an important mouthpiece for civil society', whose 'early consultation [...] by the Commission can be seen as a way of increasing participatory democracy at Union level'.⁵¹

7. *Conclusion*

In its initial role, the Economic and Social Committee was considered to be a representative body, acting on behalf of socio-economic interest groups in the institutional set-up of the

⁴⁶ Pérez-Solorzano and Smismans, *The Institutions of the Enlarged European Union* (2008), p. 212-247.

⁴⁷ Curtin, 'Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance'. 12 *Social and Legal Studies* 1 (2003), p. 55-75.

⁴⁸ Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' 8 *European Law Journal* 102 (2002), p. 114-115.

⁴⁹ Smismans, 9 *European Law Journal* 4 (2003), p. 495-496.

⁵⁰ European Commission, 'European Governance: A White Paper', COM(2001) 428.

⁵¹ European Parliament, 'Resolution on Commission White Paper on European Governance', [2002] O.J. C153 E/314.

EEC. Soon after its inception, it was clear that the Committee couldn't fulfil the expectations of such a body – mere advisory powers, unsatisfactory appointment procedures and no mechanism ensuring the respect of the Committee's opinion in the decision-making process curbed the influence of the Committee. By granting it the power of an own-initiative opinion in 1972, it was believed that the situation could be remedied if the Committee could exert influence over the Commission in earlier stages of the decision-making process. Yet, its impact remained minimal until the end of the 1990's, when a debate about participation of civil society emerged in European polity. The Economic and Social Committee saw its chance in legitimizing its institutional role by redefining itself as a forum of civil society. Unlike previous, merely 'window-dressing' attempts, it endeavoured to become more proactive within the ambit of its redefined role. Therefore, an increased emphasis was put on vertical and horizontal instruments independent from its initial powers; such as the SMO, exploratory opinions, JCCs and the CCMI. Among others, the Nice Treaty, the European Commission and European Parliament acknowledged the new role of the Committee – in an amended treaty provision and a call for participation of civil society in the Commission's White Paper and its subsequent EP resolution.

Nevertheless, there are several concerns over the new role as a forum of civil society. Appointment procedures are still the same as in 1956, compulsory and optional initiatives still make out the majority of the Committee's agenda, representation of civil society is still scattered across the whole system of EU governance and Europeanization of civil society faces the danger of losing voices of national civil society actors by jumping instead of bridging the gap. By lifting the limitations within the institutional framework once imposed by the Rome Treaty, the Committee could further enhance its new role as a forum of civil dialogue and finally abandon its reputation as an obsolete institution.

THE HIGH REPRESENTATIVE FOR FOREIGN AFFAIRS AND SECURITY POLICY: A SUPRANATIONAL OR AN INTERGOVERNMENTAL POST?

Seyda Uyar

1. Introduction

The High Representative for Foreign Affairs and Security Policy – that is a post created by the Amsterdam Treaty and extremely enriched in competences by the Lisbon Treaty in 2009. The title of this position already suggests that it must be an influential personality on the international scene with difficult tasks and duties to fulfil.

The High Representative was intended to have a bridging function between the intergovernmental part of the European Union, namely the Council of Ministers, and the supranational institution, the European Commission. Thus, he or she enjoys competences and privileges in both institutions and thereby obtains an unique position which is referred to be “double-hatted”.

My paper aims at answering the question if the post of the High Representative is more intergovernmental or more supranational in nature, thus this would also be an indication of the direction of the European Union in foreign and security policy after the Lisbon Treaty. Intergovernmentalism and supranationalism, being two opposing European integration concepts, are both firmly anchored in the different institutions of the European Union system. Firstly, I will examine the role of the High Representative under the Amsterdam Treaty and then compare his competences with those of the High Representative under the Lisbon Treaty by taking a historical perspective. My second step will consist of defining the formal function of this officeholder by pointing out his appointment procedure and his competences and powers under the Treaty.

Thirdly, I will assess the legal-political role of the High Representative and thereby highlight his significance within and outside the European Union. In doing so, I will make a reference to the possible rivalry between the President of the Commission, the President of the European Council and the High Representative, who are all three responsible for the representation of the EU in external affairs.

Fourthly, I will discuss the intergovernmental and supranational elements of this new post and question if these are compatible with each other or not. Hereby, I will also emphasize the mixed fears and scepticisms towards the neutrality of the new High Representative.

Lastly, I will refer to the achievements of the first High Representative under the Lisbon Treaty, Catherine Ashton, and by scrutinizing them I will draw my conclusion and answer my research question stated above.

2. History

2.1 Pre-Lisbon

The office of the High Representative for the Common Foreign and Security Policy (CFSP) was initially created by the Treaty of Amsterdam (1999) and was occupied by the former Spanish Foreign Minister and Secretary General of NATO Javier Solana until 2009.¹ This

¹ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-2008*, (Parliamentary Copyright House of Commons, 2008), p. 50.

position was created in order to improve the coordination, coherence and effectiveness of the CFSP and therefore appoint one single person who represents and speaks for the whole Community concerning international issues.²

The High Representative was at the same time holding the post of the Secretary-General of the Council whereby his main task was to assist the rotating Presidency of the Council³ and moreover he took part in policy formulation and implementation.⁴ However, Solana's authority was shadowed since he was dependant on the foreign ministers of the EU and furthermore he had to share the function of his post of being the contact person for the EU's foreign policy with the head of the rotating EU Council presidency.⁵

2.2 Post-Lisbon

The Lisbon Treaty that came into force in 2009 significantly extended the powers of the High Representative and increased his or her prominence.⁶ The Treaty combines the office of the High Representative with that of the EU Commissioner for External Relations and thus this unique position is often referred to be "double-hatted".⁷ As a result, among other tasks, the High Representative represents the European Council, he presides over the Foreign Affairs Council and he is a full member of the Commission and one of its Vice-Presidents.⁸

The allocation of many new tasks and duties that have been administered to this position in Lisbon should ensure greater coordination and coherence between the Union areas of external action and the intergovernmental policy of the CFSP and thus create a more unified and consistent EU external policy.⁹ The combination of a supranational post, namely the one exercised within the Commission and an intergovernmental post, the one exercised within the Council, aims basically at unifying the Unions' and Member States' interests in one representative.¹⁰

3. Function

3.1 Appointment

Art. 18(1) TEU gives the European Council the power to appoint the High Representative of the Union for Foreign Affairs and Security Policy (FASP) by qualified majority voting and with the endorsement of the president of the Commission for five years. The same procedure can be used to end the mandate of the High Representative. One crucial factor in this new appointment procedure is that the European Parliament (EP) has indirectly a say in this process, since according to Art. 17(7) TEU the Commission is subject to a vote of consent by the EP and as previously stated the High Representative enjoys "a hat" in the Commission.

² T. Salmon, *Toward a European army? A military power in the making*, (Lynne Rienner Publishers, 2003), p. 88.

³ P. Eeckhout, *EU External Relations Law*, 2nd edition, (Oxford University Press, 2011), p. 492.

⁴ P. Craig, *The Lisbon Treaty: law, politics and treaty reform*, (Oxford University Press, 2010), p. 406.

⁵ K. Hughes, *European Foreign Policy under Pressure*, 9 *Public Opinion Quarterly* 2 (2003), p. 128.

⁶ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-2008*, p. 50.

⁷ N. Nugent, *The government and politics of the European Union*, (6th edition, Duke University Press, 2006), p. 13-14.

⁸ M. Bindi, *The foreign policy of the European Union: assessing Europe's role in the world*, (Brookings Institution Press, 2010), p. 44.

⁹ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-2008*, p. 50-51.

¹⁰ K. Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, 4 *Caucasian Review of International Affairs* 1 (2010), p. 66.

This indicates that the EP may vote a censure motion on the Commission which would lead to its resignation as a body and pursuant to Art. 17(8) TEU, also the High Representative would be compelled to resign from his or her duties carried out in the Commission.¹¹

3.2 Competences

The Lisbon Treaty has established a wide range of powers and tasks for the officeholder of this unique position. Art. 18(2) TEU gives the High Representative the power to make proposals for the development of the CFSP and in addition to this Art. 22(2) TEU provides that he or she may submit joint proposals together with the Commission concerning Council decisions.

Another significant power is laid down in Art. 27(1) which states that the High Representative shall chair the Foreign Affairs Council which indicates that he or she is the person who sets the agenda of the meetings and therefore this power can be regarded as being of major importance. Additionally, Art. 24(1) TEU provides that the CFSP shall be put into effect by the High Representative together with the Member States. Art. 27(1) TEU prescribes that he or she shall also ensure the implementation of the decisions adopted by the Council and the European Council.

A further important duty for the High Representative is included in Art. 18(4) TEU that states that he or she shall ensure consistency in the EU's external action and which is a second time reinforced in Art. 21(3) TEU. Lastly, one has to mention Art. 27(2) TEU conferring him or her the power to represent the European Union on CFSP issues and to conduct political dialogue with third parties on the Union's behalf and to declare the Union's position in international organizations and at international conferences.¹² For the execution of all these tasks and duties, the High Representative will be assisted by the European External Action Service (EEAS), as provided in Art. 27(3) TEU.¹³

4. Legal-Political Role

4.1 Within the European Union

The legal-political role of the High Representative within the European Union is one of major significance, especially since the changes made in the Lisbon Treaty concerning the Union's foreign and security policy. The allocation of many important powers in this field on one single person has also created a debate about the roles of leading personalities of the Union institutions, namely the role of the President of the Commission and of the President of the European Council.¹⁴

The post of the High Representative and the creation of the EEAS should initially constitute an institutional bridge between the CFSP of the Council and external policies of the Commission.¹⁵ However, Art. 15(6) TEU states that the President of the European Council shall ensure the external representation of the Union, without prejudice to the powers of the High Representative and thereby this provision restricts the former's scope of powers enjoyed before Lisbon. The High Representative has also to compete with the President of the

¹¹ Griller, *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*, (Springer-Verlag, 2008), p. 151.

¹² Eeckhout, *EU External Relations Law*, p. 492-494.

¹³ Craig, *The Lisbon Treaty: law, politics and treaty reform*, p. 412.

¹⁴ J. Howorth, *The 'new faces' of Lisbon: assessing the performance of Catherine Ashton and Herman van Rompuy on the global stage*, (European Union Studies Association Twelfth Biennial International Conference, 2011), p. 3.

¹⁵ P. Eeckhout, *EU External Relations Law*, p. 492.

Commission, since the latter is also responsible for the external representation of the EU, except in CFSP matters.¹⁶

It seems to be hard to distinguish between the responsibilities of these three officeholders, also called “the Troika”, with regard to external representation. As a result, this unclear division of powers and duties could also lead to political incoherence, which would be opposed to the main goal of this new set-up and also effectiveness could only be achieved by agreement between these personalities.¹⁷ This was highly debated and academics even stated the opinion that this new system could easily lead to rivalry in the foreign affairs between the three EU institutions.¹⁸

4.2 Outside the European Union

The new role of the High Representative has also great influence on the international platform. Henry Kissinger, the U.S. Secretary of State, asked for a “phone number” for Europe already in the early 1970s and expressed thereby his desire to have one single contact person who could give him account on the EU’s external affairs.¹⁹ Due to the unclear distribution of tasks between the Commission, European Council President and the High Representative as discussed above, one can conclude that Kissinger’s wish is still not fully realized.

The major goal of the Lisbon Treaty that the international audience shall perceive the European Union as one unit, that speaks with one mouth and implements consistent policies in external matters is clearly revealed by the enhanced role of the High Representative.²⁰ A further competence that the new EU “foreign minister” gained for this goal is laid down in Art. 34 TEU. This provision grants him or her the power to organise the Member States’ coordination of their actions in international organizations and at international conferences where they shall uphold the EU’s position. Furthermore, Art. 34(2) TFEU prescribes that when the EU has defined a clear position on a particular subject matter which is on the UN Security Council agenda, not the Member States but the High Representative shall present the Union’s position.²¹

The last point that I mentioned could create some conflicts between the national prerogatives of the Member States and the new face for external actions. Declaration no. 14 attached to the Lisbon Treaty at the insistence of the British government²² points out that the new provisions concerning the CFSP and the powers of the High Representative will not affect the existing legal basis and powers of the Member States regarding, among others, their foreign policy and their participation in international organizations.²³ This is very crucial since with the introduction of Art. 34 TEU the Treaty aimed at ensuring greater coherence among the Member States which had an important influence in the UN Security Council but when one looks at the wording of Declaration no. 14, one can observe that they tried to reverse Art. 34 TEU by assuring that there will not be any limitation to the autonomous determination of foreign policy positions of the Member States.²⁴ Concludingly, the national prerogatives

¹⁶ C. Gegout, *European Foreign and Security Policy: States, Power, Institutions and American Hegemony*, (University of Toronto Press, 2010), p. 51.

¹⁷ Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, p. 69.

¹⁸ Griller, *The Lisbon Treaty: EU constitutionalism without a constitutional treaty*, p. 153-154.

¹⁹ Gegout, *European Foreign and Security Policy: States, Power, Institutions and American Hegemony*, p. 50.

²⁰ Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, p. 67.

²¹ W. Wessels, *The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?*, (CHALLENGE, 2008), p. 21.

²² G. Avery, *Challenge Europe - The People’s project? The new EU Treaty and the prospects for future integration*, (European Policy Centre, 2007), p. 18.

²³ Bindi, *The foreign policy of the European Union: assessing Europe’s role in the world*, p. 43.

²⁴ Ibid., p. 43-44.

continue being in the foreground, whereas the supranational element in Art. 34 TEU resides into the background.

5. *Intergovernmentalism versus Supranationalism?*

5.1 Incompatibility?

In order to find an answer to the question if the post of the High Representative is intergovernmental or supranational in nature, one has to clarify the meanings of these two concepts of European integration that were developed to describe the nature of the EU and its institutions. Furthermore, having examined in the previous parts that the High Representative inherits elements of both concepts, one should ask if these concepts are compatible with each other.

Intergovernmentalism on the one hand, basically argues that nation states cooperate in situations and conditions they can control with each other on matters of common interest and that also these states decide the nature and extent of this cooperation. Thus, this would mean that national sovereignty cannot be undermined and that State actors and their national interests are in the centre of the negotiations.²⁵ This concept can easily be found for example in the composition of the Council of Ministers of the European Union, since it is made up of ministers of each EU Member State who represent their own country and national interests.²⁶

Supranationalism on the other hand, is based on the idea that states do not have complete control over the developments that occur during their cooperation with each other and that it is therefore possible that nation states may be obliged to do things which are against their national prerogatives and their will. In such a system, Member States do not have the power to stop decisions and concludingly there is a loss of national sovereignty in those kind of assemblies.²⁷ The EU has established also supranationalist institutions, such as the European Commission, the European Parliament and the European Court of Justice²⁸ in which European and common interests are in the foreground, whereas national interests reside into the background.

With the major amendments made to the field of competences of the High Representative, these two opposing concepts were merged in one single person and exactly this is the reason why the post is often referred to be exceptionally difficult²⁹, too demanding³⁰ or extremely difficult to execute.³¹ This merging has also led to a lot of criticism and scepticism about the neutrality and loyalty of the coming High Representative, since it was alleged that a balance between the intergovernmentalist Council and the supranationalist Commission would be extremely difficult to achieve.³²

As a matter of fact, the High Representative is strongly linked to the Council of Ministers and the European Council and as a result to the Member States, the latter mirroring the intergovernmental dimension of the coin. In addition to this, it is well known that the CFSP is

²⁵ Nugent, *The government and politics of the European Union*, p. 558.

²⁶ J. Hunter, *Environmental regimes in the European Union: A comparison of effectiveness by regime level*, (Northern Arizona University, 2008), p. 66.

²⁷ Nugent, *The government and politics of the European Union*, p. 558.

²⁸ Hunter, *Environmental regimes in the European Union: A comparison of effectiveness by regime level*, p. 66.

²⁹ Avery, *Challenge Europe - The People's project? The new EU Treaty and the prospects for future integration*, p. 19.

³⁰ Griller, *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*, p. 155.

³¹ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-2008*, p. 52.

³² Avery, *Challenge Europe - The People's project? The new EU Treaty and the prospects for future integration*, p. 22.

based on a purely intergovernmentalist nature and therefore criticism deriving from supranationalist thinkers was preprogrammed.³³ Furthermore, this fear of increased intergovernmentalism in the Union's institutions was reinforced by the decision to uphold the unanimity voting procedure as opposed to qualified majority voting in the sphere of CFSP, whereas the new ordinary legislative procedure was extensively widened to many fields of the EU under the Lisbon Treaty.³⁴ On top of this, it is alleged that the change of title of this office from being "Union Minister for Foreign Affairs" into the "High Representative of the Union for Foreign Affairs and Security Policy" illustrates the fear of Member States of losing national sovereignty. This change of title in the Lisbon Treaty signifies that the Union is not willing to develop in the direction of a superstate that has its own ministers.³⁵

On the contrary, there are also supporters of the view that the arrival of the new High Representative, who is now granted influential competences within the Commission, will diminish intergovernmentalism and further the centralization of EU powers and institutions and thus reinforce supranationalism.³⁶ As one can observe, opinions about the impact that this new officeholder will have in the distinct EU institutions were diverse - and after about two years still are, to some extent. Perhaps this explains why the work of the first High Representative under the Lisbon Treaty, Catherine Ashton, was highly scrutinized and opened many debates about this new post.

On the one hand, the fact that such an office was created and is also executed since December 2009 shows that the two concepts of European integration cannot be fully incompatible, but on the other hand, it cannot be denied that it is quite difficult to balance the responsibilities and to execute them properly considering the several hats the High Representative holds.³⁷ The best person who could enlighten the public about the real effectiveness of this post and the compatibility of supranational and intergovernmentalist elements in one single mandate is without any doubt Catherine Ashton, who will be discussed below in order to exemplify the achievements and failures of the first and single person who has executed this post.

5.2 A High Representative on Probation

Baroness Catherine Ashton was appointed by the European Council and with the endorsement of the President of the Commission as the first High Representative for Foreign Affairs and Security Policy on November 19, 2009.³⁸ Between 1998 and 2001, Ashton was chairing a county health authority and in 1999 she became Labour life peer in the House of Lords. Moreover, from October 2008 until her appointment as High Representative, she has worked as Commissioner for Trade.³⁹

Ashton, a quite unknown personality, gained a lot of criticism from all over Europe as soon as she started executing the role of High Representative. She has been described as a weak and incompetent figure, who had little or even no diplomatic experience before being appointed as a High Representative. Furthermore, it is argued that this job was too challenging for someone who lacks foreign policy experience, political authority and moreover is unable to speak any foreign languages fluently.⁴⁰

³³ Griller, *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*, p. 155.

³⁴ Tosiek, *The European Union after the Treaty of Lisbon – Still an Intergovernmental System*, p. 9.

³⁵ Avery, *Challenge Europe - The People's project? The new EU Treaty and the prospects for future integration*, p. 17.

³⁶ House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty, Third Report of Session 2007-2008*, p. 52.

³⁷ Wessels, *The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?*, p. 23.

³⁸ Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, p. 67.

³⁹ Telegraph, 'Profile: Baroness Ashton, EU's new foreign minister', 20 Nov 2009.

⁴⁰ Telegraph, 'Baroness Ashton "not experienced enough", government document states', 19 Jul 2011.

It is even alleged that Ashton's appointment by unanimity mirrors the unwillingness of the EU Member States to elect someone with a strong personality and with a greater authority who could dominate the international scene.⁴¹ However, it is remarkable that most criticism comes from countries that favour a strong and more supranational EU foreign policy, such as France and less criticism on Ashton derives from countries that fear loss of their national sovereignty, such as the British.⁴² However, in contrast to these quite harsh critiques, it was also hoped that Ashton could perhaps change the intergovernmental nature of the CFSP a little in favour of more European interests, since she has worked in the Commission prior to her current office.⁴³

Considering these various opinions about this important new political figure on the international scene, one should look at the beginning of her appointment procedure, which already raises a few questions. The uncertainty about the impact of this newly created post confused many European leaders and led to the experimental election of Mrs Ashton. European leaders agreed that the former British Prime-Minister Gordon Brown shall find someone appropriate for this post and therefore Brown started looking for some well-known candidates.⁴⁴ As he could not find anyone, José Manuel Barroso suggested the quite unknown British lady Catherine Ashton, who had never underwent an election procedure before, but with whom he was acquainted.⁴⁵ She was satisfying all requirements; Ashton had a centre-left political affiliation, she was a woman and she was British and would therefore satisfy Brown's wish to have a British top officeholder.⁴⁶ If one takes into account that the office of the High Representative is one of the most influential ones as described in the Lisbon Treaty, this election procedure seems to be highly untransparent and undemocratic.

Ashton's appointment was thus spreading in the media the message that the Union will not appear on the international stage with a strong and influential voice, hence the German media even created the word "*Selbstverzweigung*", which indicated the Union's determination to remain a dwarf. As a result, this was regarded as a commitment to national sovereignty in the field of foreign and security policy and a further intergovernmental dominance by Member States in this area.⁴⁷

Having considered Ashton's occupations prior to 2009, the criticism she faced immediately after being elected and her dubious appointment procedure, one should examine what she has really achieved – or failed to achieve – since holding this post. The first wrong decision was made in January 2010, when she preferred to spend the weekend with her family in London instead of flying to Haiti where a tremendous earthquake took place.⁴⁸ The second failure followed in February, when she did not attend a meeting of defence ministers in Mallorca, which also led to criticisms from all sides.⁴⁹

In March 2010, Ashton presented a proposal on her most difficult task, the creation of the European External Action Service (EEAS) and started negotiating with the several EU institutions and the Member States for months on it.⁵⁰ Finally, the EEAS was successfully set

⁴¹ Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, p. 67.

⁴² Telegraph, 'Baroness Ashton 'not experienced enough', government document states', 19 Jul 2011.

⁴³ Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, p. 67.

⁴⁴ Howorth, *The 'new faces' of Lisbon: assessing the performance of Catherine Ashton and Herman van Rompuy on the global stage*, p. 8.

⁴⁵ Ibid., p. 9.

⁴⁶ C. Rüger, *From an Assistant to a Manager – The High Representative for Foreign and Security Policy after the Treaty of Lisbon*, (Dalhousie University, 2010), p. 16.

⁴⁷ Ibid., p. 9.

⁴⁸ Howorth, *The 'new faces' of Lisbon: assessing the performance of Catherine Ashton and Herman van Rompuy on the global stage*, p. 18.

⁴⁹ Rüger, *From an Assistant to a Manager – The High Representative for Foreign and Security Policy after the Treaty of Lisbon*, p. 18.

⁵⁰ Howorth, *The 'new faces' of Lisbon: assessing the performance of Catherine Ashton and Herman van Rompuy on the global stage*, p. 19.

up and hence it counts as one of her major achievements. Another major task for her was to show some leadership in the Middle East, South Asia, Balkans etc., which she did by visiting these countries.⁵¹ The unexpected uprisings in the Middle East from December 2010 onwards created a big disharmony between the Member States, since several European leaders proclaimed own statements on this topic and it was impossible for Ashton to make a common EU statement, which again led to criticism from all over the world.⁵²

These were some of the major problems and achievements that Catherine Ashton faced within the first two years of her office and this shows once again that the post of the High Representative bears heavy burdens and too many responsibilities to be exercised by one single person.

6. Conclusion

The analysis above shows that the Lisbon Treaty created a very important post that could be highly influential on the international scene in foreign and security policy issues. Unfortunately, the numerous tasks and duties of the High Representative might have an overwhelming effect which would hinder reaching effectiveness and consistency in this policy field.

The “double-hatted” office soon turned out to be “triple-hatted”, since the High Representative needs to cooperate - and to some extent compete - with the President of the Commission and the President of the European Council. Vaguely defined competences and powers, as well as concurrent duties of these three personalities could easily give rise to tensions between them and this would probably cause inefficiency and rivalry in this area and concludingly, the bridging function of the High Representative would miss its target. In order to prevent this from happening, the “Troika” should work closely together, define more clear and precise responsibilities and agree upon the external representation of the EU, which theoretically can be executed by all three of them pursuant to the Lisbon Treaty.

The merging of a supranational and an intergovernmental hat in one person can be regarded as a big step forward, since it aims at strengthening the cooperation and weakening the antagonism between the Council and the Commission. However, it is also remarkable, that many people think that a healthy balance of tendencies to one institution or another and neutrality is very difficult to achieve, since the office of the High Representative is biased and believed to be more intergovernmental than supranational.

Considering the achievements of Catherine Ashton on the one hand and the criticisms on the execution of her job on the other hand, one can observe that opinions about her role still differ extremely and that there is also no consensus about the influence she *should* have on the international scene. Countries that fear loss of national sovereignty, such as Britain, favour a more non-influential and non-popular personality as High Representative and are therefore rather satisfied with Ashton’s personal weaknesses, whereas countries like France, which would like to have a strong and united foreign and security policy, are quite disappointed of Ashton.

Consequently, one can conclude that the post of the High Representative is supranational in nature, but it is not clearly executed as such, since an affinity to the Council is estimated and moreover Catherine Ashton is not accepted as the “public face” of the CFSP representing the views of all 27 Member States. However, I am convinced that personalities can change a lot and this could be the case in 2014.

⁵¹ Ibid., p. 21.

⁵² Ibid., p. 22-23.

THE EUROPEAN EXTERNAL ACTION SERVICE: WILL IT CONTRIBUTE TO A MORE CONSISTENT FOREIGN AFFAIRS AND SECURITY POLICY?

Harry Sanders

1. Introduction

European Foreign Policy has developed rapidly over the last decades and is probably one of the fields where the European Union (EU) has most advanced in recent years.¹ With the start of the European Political Cooperation (EPC) in the 1970's, the Union's foreign policy has most notably been enhanced over the Treaty of Maastricht with the introduction of the Common Foreign and Security Policy (CFSP) and has further developed in the years following the Treaties of Amsterdam and Nice. The EU remained a rather fragmented actor in the field of diplomacy, the leverage and influence the EU had was mainly based on its considerable influence in trade and development, due to an inconsistent and incoherent representation of the Union. These shortcomings became more visible over time and European leaders were aware of the changing role for the Union in a more globalized world. The European Union had therefore to be stronger in its pursuit of realizing their essential objectives by means of becoming more present in the world as a political player. With this objective in mind the adoption of the *Laeken Declaration on the Future of the European Union* took place in the 2001 Council summit. In order to address these fundamental institutional problems the Lisbon Treaty merged the posts of the High Representative for the Common Foreign and Security Policy² and the European Commissioner for External Relations and European Neighbourhood Policy and created the position of a High Representative of the Union for Foreign Affairs and Security Policy³ (HR), which is supported by the European External Action Service (EEAS). The goal of this paper is to assess which implications the establishment of the EEAS had and if it is a genuine contribution to a more consistent foreign affairs and security policy. In order to do this the paper first identifies the core institutional shortcomings with regard to EU external action. Secondly, an assessment of the institutional foundations of EU external action after Lisbon is made and more in particular the competences of the HR and the organizational structure of the EEAS are assessed. Thirdly, the European response to the Libyan crisis will be analysed and evaluated in order to determine if the new institutional structure contributed to a more consistent response.

First a terminological issue should be addressed in order to narrow down what is exactly meant by a 'more consistent foreign policy' and which indicators we should look at in order to assess whether the EEAS contributes to more consistency or not. A number of authors have pointed to a terminological problem with coherence, as opposed to consistency.⁴ The problem is worsened by the linguistic complications arising from the use of the word *consistency* in the English version of the treaties, while in other versions such as the French the term *coherence* appears.⁵ In this paper the definition of *consistency* suggested by Horst-Günter Krenzler and

¹ CAP p. 8.

² This post was created with the Treaty of Amsterdam.

³ Catherine Ashton currently holds this post.

⁴ Duke, 'The Lisbon Treaty Benchmarks and the European External Action Service: Coherence, efficiency and visibility and the EEAS.' *European Union Studies Association Conference*, (European Institute of Public Administration 2011), p. 2.

⁵ P. Koutrakos, *European Foreign Policy: Legal and Political Perspectives*, (Edward Elgar publishing, 2011), p. 15.

Henning C. Schneider will be used: ‘Co-ordinated’⁶, coherent behaviour based on agreement among the Union and its member states, where comparable and compatible methods are used in pursuit of a single objective and result in an uncontradictory foreign policy’.⁷

2. *The Need for Reform in European External Action*

Coherence has a long history⁸ in EU external relations, with the Laeken Declaration the issue got specifically addressed which eventually led to the Convention on the Future of Europe and what became the Treaty of Lisbon. The working group assessed three variants of coherence that had to be improved. First, the coherence of EU’s external actions with regard to the strategic aims and objectives pursued.⁹ Second, the coherence and efficiency between the institutions and its actors has to be improved.¹⁰ And third, the coherence and efficiency at the level of services needs to be addressed. These three forms of coherence are relevant for the research in this paper to assess whether the EEAS has improved these or not.

2.1 Institutional Shortcomings of EU External Action Pre-Lisbon

The institutional shortcomings can be divided into two categories.¹¹ On the one hand, they relate to weak internal structures and on the other hand to a diffuse external representation.

2.1.1 Weak Internal Structures

Problems with regard to weak internal structures include a struggle with consistency, as the Commission takes the lead in Community matters and the Council and its Secretariat do so in CFSP matters¹² this can result to a so called ‘rival partnership’, which is most likely to happen in areas of overlapping competence. This in advance will cause inconsistencies between policies pursued by the Council and the Commission. This is a problem of ‘inter-institutional inconsistency’, but ‘horizontal inconsistencies’ between different policies are likely to emerge as well, since the policies might be dealt with by the same institution but follow different objectives.¹³ Even if inconsistency between policies is avoided, the split of foreign policy resources between the different pillars works in favour of the Commission.¹⁴ This simply

⁶ Koutrakos suggests that the term cooperation should be preferred instead of co-ordinated, the latter merely refers to the process by which ‘a coherent policy outcome is attained and the term cooperation appears in the treaties’ such as in Article 32 and 35 TEU with regard to the implementation of common positions in third countries. See P. Koutrakos, *European Foreign Policy: Legal and Political Perspectives*, p. 18-19.

⁷ Krenzler, H.-G and Scheinder, H.C., ‘The question of Consistency’, in E. Regelsbergers, P. de Schoutheete de Tervarent and W. Wessels (e.d), *Foreign Policy of the European Union: From EPC to CFSP and Beyond* (Lynne Rienner, 1997), p. 134.

⁸ Its origins can be traced back to the EPC in the 1970’s since the idea of the EPC was to ‘pave the way for a coherent role for Europe in the world’. With the Single European Act coherence was giving a more explicit role with the encouragement that ‘the external policies of the European Communities and the policies adopted by the EPC must be more consistent’. After that the Maastricht Treaty elaborated on the idea to introduce a ‘single institutional framework’, and with the Amsterdam treaty the High Representative was introduced. For a brief historical overview in this regard see Duke 2011/1, p. 2-5.

⁹ This should be measured by the result coming from objectives pursued and the aim of certain actions.

¹⁰ Relating to horizontal- and inter-institutional coherence.

¹¹ Paul, ‘EU foreign Policy after Lisbon: Will the new High Representative and the External Action Service make a difference?’ 2 *C.A.P. Policy Analysis: Research group on European Affairs* (2008), p. 7-12.

¹² This remains an exclusive Council competence: Article 24 TEU.

¹³ Paul, 2 *C.A.P. Policy Analysis: Research group on European Affairs* (2008), p. 9.

¹⁴ The Commission has around 2260 staff in charge of external action in Brussels and 4755 personnel and 123 delegations abroad. This in contrast with the Council’s Secretariat which has no more than 390 staff members

because the Council's Secretariat lacks most of the resources which are at the disposal of the Commission, they will eventually lead to inconsistency while implementing foreign policy or negotiating agreements with third countries. Additionally, weak decision making procedures obstruct a stronger role of the EU in foreign affairs especially in the field of CFSP since this is solely up to the Council to decide by unanimity.¹⁵ Another problem in this regard is the exclusion of decisions made in CFSP from jurisdiction of the Court of Justice of the EU¹⁶. The issues identified above will as a result cause a lack of leadership, there is no factor which stimulates overall strategic thinking and steer EU foreign policy in a proactive and coherent way.

2.1.2 Diffuse Representation

With a rotating Council presidency the face and voice of Europe in CFSP matters changes every 6 months, even though the High Representative stays at its post he is only tasked to assist the presidency, so the creation of this office has not solved the issue of the Union lacking stable external representation but rather made it less discontinuing¹⁷. This also influences representation on the 'ground', since it is the embassies and missions of Member States that are charged with representing the EU in third countries or at international organizations in CFSP matters. The situation worsens if the Member State who holds the Council's Presidency does not have representation in a particular third country, then another Member State's representation takes over which leads to an even more diffuse representation, even coordination through three different organs has its limits and will therefore contribute to a consistent lack of continuity in representation. Furthermore, due to an overabundance of actors¹⁸ who are supposed to represent the Union in external representation it might not be always clear for partner countries who to address. At top level the Union's interests are represented by the President of the Commission or in case of CFSP matters, he will act along with the head of state or government of the Member State who holds the Council's presidency. On ministerial level the Union acts through the Commissioner for External Action and it's the foreign minister of the presidency along with the High Representative in case of CFSP matters. When dealing with areas with an overlapping competence the situation is even worse, it's either the Commission or the Council and its High Representative who can represent the Union in third countries.¹⁹ Another option is a representation in form of the Troika, this is usually done when it comes to comprehensive political talks or issues. There is no legal regulation, with regard to situations with an overlapping competence, on how and when the different actors should act.²⁰ The different actors who are charged with external representation differ significantly in their capacity to represent on the ground, it's only the Commission who is internationally and permanently represented in third countries. Thus, all of these problems are to be considered as 'vertical inconsistency'. This leads us to the third problem, since it is mainly the Commission who takes care of EU external representation in third countries and most of their staff are no trained diplomats²¹, EU external representation has a serious lack of diplomatic professionalism. Thus, weak internal structures and a diffuse

working on international affairs. In practise, even in the field of CFSP, it is the Commission which put at least parts of CFSP decisions into effect. See Paul 2008, p. 9.

¹⁵ Article 24(1) TEU.

¹⁶ Article 275 TFEU.

¹⁷ Paul, 2 C.A.P. Policy Analysis: Research group on European Affairs (2008), p. 10.

¹⁸ Paul, 2 C.A.P. Policy Analysis: Research group on European Affairs (2008), p.11.

¹⁹ Ibid.

²⁰ This derives from Council decision 11665/1/10 REV 1 on implementing the organization and functioning of the EEAS, where in Article 3(2) is stated that 'The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions'.

²¹ Paul, 2 C.A.P. Policy Analysis: Research group on European Affairs (2008), p. 12.

representation will cause horizontal, inter-institutional and vertical inconsistency in EU external action. Also, due to weak decision making procedures, a lack of continuity in representation, diplomatic professionalism and an overabundance of actors representing the Union in third countries or international organizations, the authority, visibility and the status of the EU as an important political player is undermined.

2.2 EU External Representation and Key Initiatives from the Lisbon Treaty

To begin with the fundamental legal architecture, the new treaty has abolished the pillar structure and provided the Union with a single and express legal personality²², this will remove the remaining doubt about the capacity of the Union to act under international law and if it should be represented in international bodies. By abandoning the pillar structure, Community external action and CFSP will come closer together; namely by merging Treaty provisions²³ and establishing Union delegations.²⁴ With regard to the latter the Commission delegations will be transformed into Union delegations and they are to be put under authority of the HR²⁵, this will represent the Union as a whole instead of just the Commission.

Also, the rotating presidency of the Council has been abandoned and a permanent presidency has been put in place, he shall be tasked with the representation of the Union in CFSP on his level²⁶ without prejudice to the powers of the HR.²⁷

2.3 Consistency and EU External Action

A fair starting point regarding consistency to EU external action would be to look at the Treaties, Article 21(3) Treaty on European Union (TEU) says that: 'The Union shall ensure consistency between different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect'. Article 7 of the Treaty on the Functioning of the European Union (TFEU) states that: 'The Union shall ensure consistency between its politics and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. The principle of conferral of powers indicates that this obligation also stretches out to inter-institutional consistency. The use of 'shall' implies that 'consistency' is an obligation. Thus, the treaties establish a clear obligation regarding 'horizontal consistency' and 'inter-institutional consistency' in EU external action but also extends this to 'vertical consistency'²⁸, by stating in Article 4(3) TEU that: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

²² Article 47 TEU.

²³ The Lisbon Treaty merges all general treaty provisions on external action into one title namely Title V TEU. Henceforth, all external action, be it CFSP, trade or development shall be governed by the same general principles and objectives. See Paul 2008, p.13.

²⁴ Paul, 2 C.A.P. *Policy Analysis: Research group on European Affairs* (2008), p. 13.

²⁵ Article 221(2) TFEU.

²⁶ He is tasked to represent the Union on the level of heads of state or government, but not at ministerial level. See Article 15(5) TEU.

²⁷ Article 15(6) TEU.

²⁸ Duke, 'A difficult birth: the early days of the European External Action Service' in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, (Centre for the Law of EU External Relations, 2011), p. 70.

2.4 The High Representative of the Union for Foreign Affairs and Security Policy

The HR is entrusted a substantial amount of tasks which will put an end to the current situation of ‘split of responsibilities and resources’, this might well be the basis for a strong and influential policy tycoon who also tackles the problem of ‘weak leadership’ of the Union in external action. The HR will have the general responsibility to ‘ensure the consistency of the Union’s external action’²⁹ and shall in this regard be assisted by the EEAS, this has to include both ‘horizontal’ and ‘vertical’ consistency since the EEAS “shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of Member States”.³⁰ The HR basically wears ‘three hats’³¹:

- As the President of the Foreign Affairs Council³² (FAC), she performs the functions attributed to the Presidency of the Council. She can take the initiative in EU foreign policy and shape the Union’s agenda in international affairs by preparing the Council meetings³³ which means that she also chairs joint Councils with third States. With regard to CFSP she will share the right of initiative with any Member State.³⁴
- As Vice-President of the Commission (VP) the HR performs functions of the External Affairs Commissioner³⁵, and is therefore within the Commission accountable for responsibilities on external relations and coordinating other aspects of external action. Even though in non-CFSP matters, the Commission will still have an exclusive right to initiative³⁶, the HR shall contribute to consistency.
- As HR she conducts the CFSP and CSDP policy in accordance with Article 18(2), 27(1), 30(1) and 42(4) TEU.

Due to the triple headed function the HR can assure greater coherence both horizontal; by chairing the FAC and acting as the VP of the Commission which will also influence inter-institutional coherence and vertical, by conducting the CFSP and CSDP.³⁷

2.5 The European External Action Service

In all these areas she is assisted by the EEAS, the organization and functioning is according to Article 27(3) TEU worked out in a Council Decision.³⁸ The Decision sets a broad mandate for the EEAS, it shall assist the President of the European Council, the President of the Commission and the Commission in the exercise of their respective functions in the area of external relations.³⁹ The Council Decision emphasizes the ‘triple hatted’ role of the HR and

²⁹ Article 18(4) TEU.

³⁰ Article 27(3) TEU.

³¹ Bono, ‘The organization of the external relations of the European Union in the Treaty of Lisbon’, in P. Koutrakos (ed.), *The European Union’s external relations a year after Lisbon*, (Centre for the Law of EU External Relations, 2011), p. 22-23.

³² Article 18(3) TEU.

³³ She won’t be a member of the Council, see Article 15(2) TEU.

³⁴ Paul, 2 *C.A.P. Policy Analysis: Research group on European Affairs* (2008), p. 17.

³⁵ Article 18(4) TEU.

³⁶ Article 17(2) TEU.

³⁷ This is the policy field with special rules and wherein Member States are usually not too keen on letting the Union act, as we shall see with the assessment of the EU’s response to the Libyan crisis.

³⁸ Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, OJ 2010 L 201/30.

³⁹ Article 2(2) of Council Decision 2010/427.

the supportive function of the EEAS in this regard⁴⁰, which from a coherence perspective is desirable to limit inter-institutional and horizontal inconsistency. The EEAS operates as a functionally autonomous body⁴¹ and drawing on the triple headed function of the HR it is thus situated amidst the Commission and the Council. In order to facilitate coordination and consistency, the EEAS and the Commission shall consult each other on all matters relating to external action of the Union and the EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission.⁴² Since in non-CFSP the right on initiative lies solely with the Commission it can be the EEAS who can contribute to consistency and has an indirect influence on the substance of the proposals. Furthermore shall the EEAS extend appropriate support and coordination to the other institutions and bodies of the Union⁴³, in particular to the European Parliament. Most of the preparatory bodies of the FAC are therefore chaired by a representative of the HR coming from the EEAS, this gives the EEAS a great role in the field of policy making, and for example they prepare decisions submitted for Commission approval such as country allocations of financial aid or country and strategic papers.⁴⁴

2.6 Organizational Structure and the Efficiency of the European External Action Service

In day-to-day terms efficiency within the EEAS is ensured by the Corporate Board, which includes the HR the Executive Secretary-General, the Chief Operating Officer and two Deputy Secretaries-General. They are responsible for the smooth functioning of the EEAS as a whole. The Policy Board will ensure general coherence and make sure 'that multi-lateral issues are reflected in the geographical and regional concerns and vice versa'.⁴⁵ The Corporate Board gives guidance to the Policy Board, this is the task of one of the Deputy Secretary General. Institutionally speaking the Policy Board is likely to become 'the essential bridge between the EEAS and the FAC and the General Affairs Council and the Council Secretariat and, at senior level, with the relevant Commission Directorates-General via the other Deputy Secretary-General'.⁴⁶ The creation of unified Union delegations abroad, and abandoning the separate Council and Commission representation in third countries will lead to an optimal deployment of resources and avoid a split of resources wasted on the ground.⁴⁷ Staff for these delegations abroad will come from several offices that previously served under the Council or the Commission. The staff from the Policy Unit 'CSDP and crisis management structure' of the General Secretariat of the Council is merged into the EEAS, as well as the Directorate-General E. From the Commission the Directorate-general for External Relations (DG RELEX), the External Service and the Directorate-General for Development (DG DEV) are merged into the EEAS. In total this will be a transfer of 3645 staff members (1611 in headquarters and 2034 in delegations)⁴⁸, most of the staff will come from DG RELEX which for the most part were serving in geographical desks as well as in the External Service.

⁴⁰ Preamble paragraph 3 of Council Decision 2010/427.

⁴¹ Paasivirta, 'The EU's external representation after Lisbon: New rules, a new era?' in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, (Centre for the Law of EU External Relations, 2011), p. 43.

⁴² Article 3(2) of Council Decision 2010/427.

⁴³ Article 3(4) of Council Decision 2010/427.

⁴⁴ Paasivirta in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, p. 43.

⁴⁵ Duke, in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, p. 77.

⁴⁶ Duke, in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, p. 77; for a full overview of the organizational structure see Annex I attached to this paper.

⁴⁷ Smyth, 'EU external action after the entry into force of the Lisbon Treaty: Coherence at last?' in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, (Centre for the Law of EU External Relations, 2011), p. 64.

⁴⁸ Duke, in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, p. 78.

3. A Practical Survey: Europe's Response to the Libya Crisis

The response to the Libya crisis was a first test for the HR and its EEAS since it was the first major issue with regard to crisis management of EU after the Lisbon Treaty. The EU possesses a lot of crisis management instruments including diplomatic measures, humanitarian aid and civil protection, military and civilian operations and migration- and trade-related activities.⁴⁹ In response to the Libya crisis a lot of these instruments have been deployed in order to react to the events unfolding in Libya from February 2011 onwards. As we have identified and distinguished between three types of consistency we will assess the coherence of EU crisis management to the Libya crisis along these lines.

3.1 The Deployment and Coherence of EU Crisis Management Instruments

The first response came on February the 20th from the HR she issued a declaration expressing that the EU was 'extremely concerned by the events unfolding in Libya',⁵⁰ the declaration urged the Libyan government to refrain from violence against its civilians. On March the 11th, during an extraordinary European Council meeting the Heads of State declared that Gaddafi has lost all legitimacy and urged him to step down. Furthermore, they welcomed and recognised the TNC, while not as the sole representative of Libya, as 'a political interlocutor'.⁵¹ On May the 22nd, Ashton opened a liaison office in Benghazi for support of the civilian population and helps the TNC with security reform, the economy, health and education issues. The Commission reacted to the Libya Crisis with two of its emergency instruments; the civil protection mechanism and with humanitarian assistance.⁵² With regard to the former, it was activated on February the 23rd to facilitate Member States consular operations and evacuate roughly 5800 EU citizens. On May the 30th, the Commission and Member States had provided over €144,8 million for humanitarian aid and civil protection.⁵³ The enormous influx of refugees from North Africa had activated Frontex Joint Operation Hermes 2011 protection mechanism on February the 20th to assist Southern European Member States in coping with these migration flows.⁵⁴ Also, the EU implemented sanctions imposed by UNSC resolutions 1970⁵⁵ and 1973⁵⁶ on 21st, 23rd and 25th March and on April 12.⁶⁰ All in all, several crisis management measures have been deployed over time.

⁴⁹ Koenig, 'The EU and the Libyan Crisis: In Quest of Coherence?', *1119 Istituto Affari Internazionali* (2011), p. 4.

⁵⁰ Council on the European Union, *Declaration by the High Representative, on behalf of the European Union on events in Libya* (6795/1/11 Presse 33), Brussels 20 February 2011.

⁵¹ Council on the European Union, *Declaration of the Extraordinary European Council*, 11 March 2011 (EUCO 7/1/11 REV 1), Brussels, 20 April 2011.

⁵² Koenig, *1119 Istituto Affari Internazionali* (2011), p. 4.

⁵³ European Commission – ECHO, *Libyan Crisis*, Factsheet, 21 June 2011. Available on http://ec.europa.eu/echo/files/aid/countries/libya_factsheet.pdf

⁵⁴ Frontex, 'Hermes 2011 running', in *News Releases*, 22 February 2011. Available on http://www.frontex.europa.eu/newsroom/news_releases/art96.html

⁵⁵ United Nations Security Council Resolution 1970, S/RES/1970 (2011) adopted on 26 February 2011.

⁵⁶ United Nations Security Council Resolution 1973, S/RES/1973 (2011) adopted on 17 March 2011.

⁵⁷ See Council Implementing Regulation No 272/2011, [2011] OJ 2011 L 76/54.

⁵⁸ Council Implementing Regulation No 288/2011, [2011] OJ 2011 L 78/54.

⁵⁹ Council Implementing Regulation No 296/2011, [2011] OJ 2011 L 80/54.

⁶⁰ Council Implementing Regulation No 360/2011, [2011] OJ 2011 L 100/54.

3.2 Horizontal Coherence

The goals pursued through the different mechanism of crisis management do not seem to contradict each other: diplomatic measures aim for peaceful conflict resolution this combined with humanitarian aid and restrictive measures were all intended to deprive Gaddafi's regime of means of repression, the activation of Frontex was there to secure mainly the Italian and Maltese borders from an enormous influx of migrants. Only the latter is open to criticism since failing to rescue refugees from Libya could be seen as a Human Rights abuse which is in contradiction of the general aims of the Treaties. But all in all, there was great horizontal coherence.

3.3 Inter-institutional Coherence

The HR and the EEAS were the most notable institutional innovations brought about by the Lisbon Treaty and were meant to enhance the EU's ability to speak with one voice and tackle the issues of diffuse representation and to ensure coherence and consistent EU's external action. With regard to the first statement made by the HR on February the 20th similar statements were made by other EU institutions.⁶¹ Even though these statements were similar and generally consistent with each other it still undermines the authority of the HR as the spokesperson for EU external affairs. This is worsened when the President of the Council and the HR issued completely divergent statements on the goal of the military intervention in Libya.⁶² Thus, this has led to a huge inter-institutional inconsistency. With regard to the EEAS and its role in strategic guidance and coordination, the organization has barely been visible since most of the former DG RELEX staff still acts in a 'Commission-spirit' and EEAS officials have raised complaints about the bureaucratization of the exchange of information.⁶³ Senior diplomats described the role of the Policy Board consisting of former DG RELEX staff merely as 'an extra-layer between the Commission and the EEAS'.⁶⁴ Thus, the cooperation between the EEAS and the Commission has been far from smooth and is has already raised criticism from the European Parliament. This all leads us to the conclusion that inter-institutional consistency has not increased and perhaps even decreased, since before Lisbon there were no real obligations on the Union with regard to consistency.

3.4 Vertical Coherence

This is perhaps the field of coherence which is far from perfect. Notably on the same day the HR issued the first declaration on behalf of the Union Berlusconi told the press that 'he had not called Gaddafi because he did not want to disturb him'.⁶⁵ The statement was clearly not even close to be consistent with the agreed diplomatic statement in the Council. Also with the 'recognition' of the TNC as a 'political interlocutor' different statements came out. Before the meeting of the Council on the 11th of March, the French government for instance recognised the TNC as the sole legitimate representative of the Libyan people⁶⁶ and announced the exchange of ambassadors, which was clearly inconsistent with the statement issued by the Union. It appears that the Member States act in a way which is in their own national interest instead of sticking to the agreed statement in the Council. This will result in a lack of 'respect'

⁶¹ Koenig, *1119 Istituto Affari Internazionali* (2011), p. 8.

⁶² Koenig, *1119 Istituto Affari Internazionali* (2011), p. 8

⁶³ Koenig, *1119 Istituto Affari Internazionali* (2011), p. 9.

⁶⁴ Ibid.

⁶⁵ Deepa Babington, "Berlusconi under fire for not 'disturbing' Ghaddafi", in Reuters, 20 February 2011, <http://uk.reuters.com/article/2011/02/20/uk-italy-libya-berlusconi-idUKTRE71J2CI20110220>.

⁶⁶ Koenig, *1119 Istituto Affari Internazionali* (2011), p. 10.

for the HR and her authority. Most notably was the vertical inconsistency with regard to the military intervention, Germany broke ranks with the Union and its NATO partners by abstaining to vote on the UNSC resolution 1973⁶⁷. All in all, vertical coherence seems far from present in the Libyan response and there is a clear lack of 'respect' for the authority of the HR from several Member States of the EU.

4. *Conclusion*

The European Union and the EEAS clearly failed in practice to contribute to more consistency with regard to EU external action. The attempt to address the need for reform with the major institutional changes introduced in the Lisbon Treaty have not lead to the EU being more coherent, visible and effective. The struggle with consistency still remains in particular in the field of vertical consistency, since there is an apparent lack of 'respect' for joint statements on EU foreign policy and Member States rather try to pursue their national interests. A clear lack of leadership by the HR is therefore a direct consequence of this lack of respect by Member States. The Institutional framework is there to serve and contribute to a more consistent EU foreign policy, especially the role of the EEAS in this regard will be of great importance since the Union now enjoys one institution which is responsible for representation abroad. The diffuse representation which existed before Lisbon has been abandoned, as well as the lack of continent representation on state and government level. Even though the innovative institutional changes introduced by Lisbon have a high potential for the EU becoming an important player on the global political stage it seems that much will depend on the Member States' future political will.

⁶⁷ Ibid.

THE ECONOMIC CRISES AND THE NEED TO AMEND THE TREATY

Armin Lambertz

1. Introduction

Amending the Treaties of the European Union can be an exhausting undertaking. Many tedious steps need to be taken until a final conclusion is eventually reached. It is all the more surprising with what virtually incredible pace European leaders are currently heading towards exactly this direction – incredible pace at least in comparison to the speed Brussels usually displays when it comes to far-reaching decision-making in serious matters. This ‘pulling oneself together’ is owed to the turmoil caused by the economic and sovereign debt crisis which is far from being solved. Having departed from Greece, still constituting the biggest problem child, formerly deemed stable states such as Ireland, Portugal and Spain have been affected (or infected) nevertheless, bringing the Monetary Union as a whole under considerable pressure.¹

And yet, a long-term solution to prevent economic mayhem and perhaps even the utter ruin of the Euro as shared currency has still not been put in place by the Member States. The already existing European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF) - both set up last year - have been proven insufficient in this regard.² The latest attempt to antagonise the crisis has been the adoption of a Treaty amendment by means of the ‘simplified revision procedure’ to Article 136 TFEU which aims to allow for the coming into operation of the European Stability Mechanism (ESM).³ Whilst the ESM itself is governed by an independent agreement between the euro Member States, subject to the rules of International law, it will be demonstrated that EU institutions are going to be involved in sensitive fiscal policy fields under this mechanism, nonetheless. In this context, the paper at hand especially seeks to analyse whether the envisaged introduction of collective action clauses (CACs) under the ESM in national government bonds via EU legislation will bring about an increase in Union competences, which would render the use of the simplified revision procedure illegal; for this procedure must not be applied should the Treaty amendment result in an alteration of EU powers.

As regards the structure of this paper, I will start out by explaining the different amendment procedures provided for in the Treaty of the European Union (Section 2), followed by an outline of what the ESM entails and how the European Council has attempted to incorporate it in the legal order of the Union (Section 3). Thereafter, I will turn to a thorough legal assessment on the validity of the amendment at hand by scrutinising in particular the question of whether the amendment adopted, and the procedure applied to this end, fulfil the aspiration to neatly integrate the ESM into Union law (Section 4). In my conclusion (Section 5), I will state why I am reluctant to accept the legality of the adopted amendment but also why a final analysis of the legal issue at hand proves to be difficult at the moment due to insufficient information on the eventual shape of the contested collective action clauses.

¹ M. Hallerberg, ‘Fiscal federalism reforms in the European Union and the Greek crisis’, *12 European Union Politics I* (2010), p. 128.

² V. Miller, *Amending the EU Treaty: the European Stability Mechanism* [Working Paper], House of Commons (Standard Note: SN/IA/5812) (2010), p. 2.

³ European Council (24-15 March 2011) Conclusion; EUCO 10/1/11. [Retrieved via http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf, last visited 5th December 2011].

2. *The Procedures of Treaty Amendments*

The entering into force of the Lisbon Treaty in 2009 brought about changes regarding the manner in which Treaty Articles may be amended. Whilst prior to its adoption only one procedure was more or less available coming close to what is now the ‘ordinary revision procedure’, Article 48 TEU now also provides for two additional ‘simplified’ procedures,⁴ being the ‘simplified revision procedure’ as well as the *passerelle* clause. The name of the ‘ordinary revision procedure’ is somehow misleading, for it is unlikely to be the most commonly used procedure. Rather, this is the procedure to be taken when the requirements for the other procedures are not met.⁵

It requires a proposal to be presented to the Council which, thereupon, submits it to the European Council while notifying National Parliaments thereof.⁶ After consulting the Commission and the European Parliament as well as the ECB, provided the proposal affects monetary policies, the European Council votes on the proposal. Should it receive a simple majority, a Convention is convened during which, besides the heads of the national governments, delegations from Commission, national parliaments and the European Parliament examine the proposal with the aim to finally adopt a recommendation.⁷ Alternatively, the European Council may decide not to convene such a Convention when it deems this unnecessary. In this case the European Council itself determines the terms of the recommendation. Such a decision can, however, not be taken without having consulted the European Parliament first.⁸ The terms of the recommendation define the mandate based on which a following intergovernmental conference (IGC), comprising of representatives of the national governments, may agree upon the final version of the amendment to the Treaty.⁹ Thereafter, the adopted proposal is submitted to the Member States which need to ratify it according to national constitutional requirements.¹⁰

The two available ‘simplified’ procedures are distinct in the purpose they serve. Whilst as regards the question of who may propose amendments they do not differ from the ‘ordinary revision procedure’, the *passerelle* clause, contained in Article 48(7) TEU, merely provides for the possibility to alter the voting procedure from unanimous to QMV or a legislative procedure from special to the ordinary legislative procedure in a certain clause and is thus very restricted in application. There is neither a need for a convention nor an IGC; an unanimous vote by the European Council, after having received the consent of the European Parliament, suffices. National Parliaments are only involved insofar as they may oppose to the adoption but they do not have to expressly ratify it.

The ‘simplified revision procedure’ provided for in Article 48(6) TEU, on the other hand, is concerned with amendments to Part Three of the TFEU which do not result in an increase in Union competences. As with the *passerelle* clause, a convention and an IGC are dispensable. Since the European Council takes decision by unanimity also under this head, each Member State is vested with a *de fact* veto right. An additional hurdle to overcome is that, like for the ‘ordinary legislative procedure’, ratification in the Member States is required in accordance

⁴ *Note*: there is another procedure applying to accession treaties (Art. 49 TEU); but since this is not of relevance for the topic of this paper, this procedure is not included.

⁵ B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism* [Working Paper], Swedish Institute for European Policy Studies (2011) [Retrieved via <http://cadmus.eui.eu/handle/1814/18338>, last visited 1st December 2011], p. 3.

⁶ Art. 48(2) TEU.

⁷ Art. 48(3) TEU.

⁸ Art. 48(3) TEU.

⁹ P. Broin, *How to Change the EU Treaties – An Overview of Revision Procedures under the Treaty of Lisbon*, [Working Paper] Centre For European Policy Studies (2010) [Retrieved via <http://www.ceps.be/book/how-change-eu-treaties-overview-revision-procedures-under-lisbon-treaty>, last visited 1st December 2011], p. 3.

¹⁰ Art. 48(4) TEU.

with their domestic procedures. It will be seen below in how far this could constitute a challenging impediment for the ESM in some countries.

3. *The Establishment and the Purpose of the ESM*

Before examining the manner by which the European Stability Mechanism is going to be incorporated in the EU legal order, a brief overview of what this mechanism entails and how it has been adopted shall be given.

Endorsing the Declaration pronounced by President Sarkozy and Chancellor Merkel at Deauville calling upon the Member States to consider Treaty changes so as to allow for the establishment of promising crisis mechanism,¹¹ the European Council agreed to take precise steps towards this direction at the end of October 2010.¹² The states remarkably expressed their preference to establish such a mechanism not by the European Union itself, but as an EU-independent Treaty amongst them governed by International law. This decision was made for good reasons as it allowed the Member States to allegedly use the simplified revision procedure under Article 48(6) TEU. It was argued that the amendment, constituting a form of enhanced cooperation, merely affects the ‘internal policy’ part of the Treaty on the Functioning of the European Union, which is contained in Part Three, and does not entail an increase in power or competences of the European Union. All requirements of the ‘simplified revision procedure’ were, therefore, deemed fulfilled.¹³ It will be seen below that my opinion differs on this point. Not even a month later, the European Council agreed on a draft text aiming to add a third clause to Article 136 TFEU. Upon adoption, Article 135(3) subsequently reads:

*“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”*¹⁴

The amendment was finally adopted at a third meeting in March 2011. When entering into force in summer 2013, the ESM will replace the temporary European Financial Stability Facility (EFSF) and absorb the European Financial Stabilisation Mechanism (EFSM).¹⁵ In essence, the mechanism with its seat in Luxembourg comprises of a pool of financial aid with a capital stock of initially seven hundred billion euro,¹⁶ that can be made available to Member States undergoing severe financial troubles under the condition to declare themselves subject to tight austerity measures.¹⁷ The last step which had still to be taken was the official signing of the Treaty Establishing the European Stability Mechanism, which eventually occurred in July 2011.¹⁸

¹¹ Franco-German Declaration: *Statement for the France-Germany-Russia Summit*, Deauville, 18 October 2010. [Retrieved via http://www.elysee.fr/president/root/bank_objects/Franco-german_declaration.pdf, last visited 5th December 2011].

¹² European Council (23 October 2010) Conclusion; EUCO 52/11. [Retrieved via http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125496.pdf, last visited 5th December 2011].

¹³ De Witte, [Working Paper], Swedish Institute for European Policy Studies (2011), p. 7.

¹⁴ European Council (24-15 March 2011) Conclusion.

¹⁵ Miller, [Working Paper], House of Commons (Standard Note: SN/IA/5812) (2010), p. 2.

¹⁶ Art. 8(1) Treaty Establishing the European Stability Mechanism.

¹⁷ J. B. Gott; ‘Addressing the Debt Crisis in the European Union: The Validity of Mandatory Collective Action Clauses and Extended Maturities’. 12 *Chicago Journal of International Law* 1 (2011), p. 206.

¹⁸ See link: http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm.

What is thus worth reiterating is the fact that the ESM will not be governed by Union law, but is instead subject to general rules of International law and is thus exempted from any constraints EU law would normally impose upon such a mechanism.¹⁹ Moreover, this amendment will diminish the vigour of the no-bailout rule contained in Article 125; a provision that has hitherto prohibited the possibility to provide direct financial support from one Member State to another (though this was done in the past nonetheless).²⁰

4. *Legal Assessment of the Treaty Change*

After having presented a short overview of the ESM, we may now turn to the essential questions of (i) why a Treaty amendment for the ESM was needed in the first place and (ii) whether the mechanism will be based on solid legal ground after such amendment. To this end, recourse has to be made to the two mechanisms already in existence - namely the EFSF and the EFSM - and the legal issues they have been subject to.

4.1 Need for Treaty Amendment

Being adopted in May 2010, both instruments (EFSF and EFSM) are considered to be based on rather thin ice from a legal perspective. Since the mechanisms basically provide for the possibility of giving loans to troubled states under strict conditions, it is not entirely clear whether such measures are not at odds with the 'no-bailout clause' of Article 125(1) TFEU.²¹ This clause excludes liability of the Union or a Member State for debts of another Member State, and has been frequently referred to by Angela Merkel in the course of the crisis prior to the Declaration in Deauville, echoing the general fear in the German population that the EU has been drifting towards a transfer union.²²

The second issue concerned the Article on which the EFSM was based - Article 122(2) TFEU. It reads that the Council may grant financial aid to Member States in severe difficulties where these difficulties were caused by circumstances which are beyond the Member States' control. It can, however, quite easily be argued that the governments of Greece and Ireland, both having received money under the mechanisms, at least partially contributed to the excessive debts due to which their respective countries are currently struggling.²³

The German constitutional court, well-known for its rigid advocacy of democratic principles in such issues, is at the moment confronted with two pending cases - one regarding the EFSF, the other regarding the EFSM - whose outcome is balanced on a knife's edge.²⁴²⁵ They are in essence concerned with the violation of the no-bailout rule as well as the allegedly wrong decision to base the EFSM on Article 122 TFEU, on the one hand, and the fact that the German Parliament had not been given any say in dispensing financial aid to Greece which

¹⁹ De Witte, [Working Paper], Swedish Institute for European Policy Studies (2011), p. 8.

²⁰ *Managing the Euro Crisis – Are Changes to the EU Treaty Necessary?*, [Report] Mayer Brown (2011) [Retrieved via <http://www.mayerbrown.com/publications/article.asp?id=11753&nid=6>, last visited 1st December], p. 1.

²¹ De Witte, [Working Paper], Swedish Institute for European Policy Studies (2011), p.

²² G. Barrett, *First Amendment? The Treaty Change to Facilitate the European Stability Mechanism*, [Working Paper] The Institute of International and European Affairs (2011) [Retrieved via <http://www.iiea.com/publications/first-amendment--the-treaty-change-to-facilitate-the-european-stability-mechanism>, last visited 1st December 2011], p. 4.

²³ Ibid, p. 6.

²⁴ See e.g. Frankfurter Allgemeine Zeitung, *Richter verhandeln über Milliarden für Griechenland*, 5th July 2011.

²⁵ See e.g. Frankfurter Allgemeine Zeitung, *Karlsruhe zweifelt an Neuner-Gremium*, 29th November 2011.

was seen as leading to an erosion of basic parliamentary powers, on the other hand.²⁶ For an *interim* measure, the court has decided not to allow any other bail-outs until a final judgment is delivered.²⁷

Facing these cumbersome issues, the Member States wisely chose to seek the pave of Treaty amendments. Proposals to equally base the ESM on Article 122(2) TFEU were in fact rapidly dropped.²⁸ Not only would the additional clause added to Article 136 TFEU diminish the consequences of a negative ruling in the German Constitutional Court, because future measures could then be put in place on a solid legal basis,²⁹ but it also, by taking the intergovernmental route, opens the door to a field of decision-making freedom which would be unthinkable under current EU law.³⁰

4.2 Assessment

We shall now turn to the essential question of whether the ESM truly serves the intended purpose of ironing out the legal problems with which its predecessors were confronted. The two most important features of the ‘simplified revision procedure’ under Article 48(6) TFEU may be recapped at this point: first, any amendment under this head must not result in an raise of Union competences, and, second, the various Member State have to ratify any amendment in accordance with national constitutional rules – which may even require a referendum in certain countries. This is indeed a point worth dwelling on, for especially the Irish requirements as regards ratification proved to be cumbersome in the past.³¹

Whether a referendum is required in this Member State is dependent upon the so-called *Crotty* test, devised by the Irish Constitutional Court in *Crotty v. An Taoiseach* (1987).³² What this test comes down to is the assessment of whether Treaty amendments will lead to a change in the ‘essential scope or objectives’ regarding the Treaty at hand. Should the answer be affirmative, a referendum must be called.³³ The test is thus also of special interest in respect to this paper in the sense that we may kill two birds with one stone: by having regard to the criteria set out in *Crotty* we can simultaneously examine whether the ‘simple revision procedure’ of Article 48(6) TEU was indeed the appropriate manner of amending the Treaty. For, it will be remembered, this procedure must not be seized should the amendment at stake alters Union powers.

The Commission itself commented, in its Opinion on the European Council decision, on this issue stating that the adopted change is not to expand the competences conferred on the Union thus far. This is deemed to be the case because all the member states have already taken part in the EFSF which the ESM is intended to substitute.³⁴ However, in light of two pending cases before the German Constitutional Court, this statement appears somehow audacious. The entire argumentation rests in fact on the risky assumption that the putting in place of the

²⁶ See e.g. Der Spiegel, *Complaints about rescue fund – Germany’s Top Court may attach strings to Euro bailout*, 13th June 2011.

²⁷ See Frankfurter Allgemeine Zeitung, *Richter verhandeln über Milliarden für Griechenland*, 5th July 2011.

²⁸ Miller 2010, p. 3 (cited in note 2).

²⁹ Art. 136(3) TFEU will prevail over Art. 125 TFEU under the conditions set out in the former provision due to the principle of *lex specialis derogate legi generali*.

³⁰ De Witte, [Working Paper], Swedish Institute for European Policy Studies (2011), p. 6.

³¹ Miller, [Working Paper], House of Commons (Standard Note: SN/IA/5812) (2010), p. 6.

³² *Crotty v. An Taoiseach* [1987] IESC 4; [1987] IR 713 (9th April, 1987)

³³ Dr. G. Barrett (2010), *Does the Treaty Amendment on the European Stability Mechanism Require a Referendum in Ireland?*, [Working Paper] The Social Science Research Network (2011) [Retrieved via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938659, last visited 5th December 2011.], p. 4.

³⁴ Commission Opinion: *on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to stability mechanism for Member States whose currency is the euro*; COM (2011) 70/3, 20th December 2010 [Retrieved via http://www.europolitics.info/pdf/gratuit_en/288350-en.pdf, last visited 5th December 2011].

instruments was lawful under *current* EU law. Yet as it has been demonstrated above, this is still a matter of considerable debate. It should not be forgotten that the ambiguity of Article 122 TFEU as well as its relationship to Art. 125 TFEU was one major incentive to call for the amendment in the first place.

The reasoning may be considered to stand on even shakier ground when noticing what the European Stability Measure will entail. In the Conclusion of the European Council from mid-December 2010, one special feature of the ESM was intended to provide for the possibility that insolvent Member States may negotiate a ‘comprehensive restructuring plan’ with creditors from the private sector in order to regain liquidity. In order to facilitate this, collective action clauses (CACs) shall be included in *all* government bonds within the euro area after the ratification of the amendment.³⁵ Whilst normally bondholders may decide by unanimity to alter the terms of its assets (so-called unanimous action clauses), collective action clauses allow for these decisions to be taken by a supermajority (a majority prescribed in the clauses itself). In addition to this (but maybe not of equal range), euro area governments will be required to lengthen the maturities of issued bonds;³⁶ though it is thus far not quite certain whether this will constitute a recommendation or a genuine mandate.³⁷ Due to this lack of clarity, the following legal analysis will not focus on this point; yet, it is still worth-mentioning that if they are indeed enacted in binding form, they will be subject to basically the same criticism.

Gott argues in his assessment regarding the validity of CACs and extended maturities that they may assumingly be tied to the establishment of the ESM thanks to the doctrine of implied powers. Under this doctrine, measures may be valid under EU law even if there is no specific legal basis for them provided they aim to secure the effectiveness of another valid action.³⁸ It follows that these changes of bond terms become a prerogative for the EU bodies in the sense that they will be empowered to enact binding EU legislation relating to fiscal policy of the Member States.^{39,40} Though the heads of states have not yet explained how CACS will eventually be put in place, the most likely way would be the enactment of an EU Directive.⁴¹ It is exactly this feature which makes the Treaty amendment challengeable in my opinion.

This is so because if we rely on the author’s conclusion we subsequently face a pressing question: If the ESM is not deemed to increase any Union competences and merely aims to substitute the EFSF and to absorb the EFSM, why has the Union not already adopted legislation aiming to alter national bond terms if it is deemed necessary? The answer is simple: hitherto the Treaties do not provide for any interference with national bond terms by any EU institution. The power to interfere with the fiscal policy of the Member States has never been transferred upon the European Union at another time. This does not come as a surprise because the EU comprises only a monetary but no fiscal union. However, interference with bond terms of Member States certainly falls into the latter category which remarkably would mean a noteworthy move to fiscal or even political integration.⁴²

³⁵ See Annex II in European Council (December 16-17) Conclusion; EUCO 30/1/10 [Retrieved via http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf, last visited 5th December 2011].

³⁶ Ibid.

³⁷ Gott, 12 *Chicago Journal of International Law* 1 (2011), p. 207.

³⁸ Ibid, p. 225 (see also for doctrine of implied powers: *Commission v Council*, Case C-176/03).

³⁹ Ibid, p. 207.

⁴⁰ Karel Lannoo, *The EU’s Response to the Financial Crisis: A mid-term review*, [Working Paper] CEPS Policy Brief (2011) [Retrieved via <http://www.ceps.eu/book/eu%E2%80%99s-response-financial-crisis-mid-term-review>, last visited 1st December 2011], p. 8.

⁴¹ Ibid.

⁴² Gott, 12 *Chicago Journal of International Law* 1 (2011), p. 227.

If this is what has occurred via the given amendment to Article 136 TFEU- meaning that the validity of such CACs tied to the ESM under the doctrine of implied power is accepted -, this can be considered to lead to an augmentation of EU legislative powers to the effect that the European Council has wrongly decided to amend the Treaty in accordance with Article 48(6) TEU.

Surely, the European Stability Mechanism itself is, first and foremost, established amongst the euro states by virtue of an independent Treaty,⁴³ and the European Council had had good reasons not to include the propositions of the European Parliament relating to the involvement of EU institution in determining the conditionality of financial assistance under the ESM. For this would have undoubtedly brought about a clear extension of Union competences.⁴⁴ Yet as I have demonstrated above, even the current regime of the ESM poses many questions in respect to the procedure by which it was set in place. The independent Treaty does indeed enable the Member States to go far beyond the usual scope of Union policy. But it is not a means by virtue of which new powers may be conferred upon the EU itself allowing it to become active in areas of national policies which were inviolable in the past.

Admittedly, a final assessment remains hitherto difficult since the precise terms as regards CACs will be drafted not before the end of 2011. While working on this paper insufficient information were available in this regard. My preliminary assessment makes it dependent upon the arrangements of the collective action clauses with respect to the involvement of Union institutions concerning the terms of such CACs whether a *de facto* increase in competences will have been brought about by the amendment or not. The possibility of considerable participation of EU institutions in the arrangements governing national bond terms is not to be excluded. Should this eventually be the case, the result is a step forward towards fiscal integration under Union law which is solely possible via an extension of Union powers.

This of course is likely to gravitate constitutional complaints before national courts and will, therefore, certainly exacerbate the ratification process. I do not share the optimism of Brian Cowen, Taoiseach of Ireland, who held that calling for a referendum in his country will be regarded dispensable.⁴⁵ When litigation before or reference to the court will be sought by whatever party, the ratification process is in danger for the afore-stated reasons. The *Crotty* test, as has been said, focuses on changes in the 'essential scope or objectives' of a Treaty. Making a move from a monetary to a fiscal Union, however small this move arguably might be, indeed alters the character of the EU in an essential manner for what reason I am of the opinion that the court will highly question the amendment adopted.

The ESM faces another problem in view of the litigation before the German *Bundesverfassungsgericht* concerned with the validity of prior bailouts. Should the court deem the financial rescues in the past to be contra EU law, the Treaty amendment adopted this year must inevitably be considered an extension of Union competences. Even though the aftermaths of such a judgement do not concern the whole of Europe, it will have negative effects on German ratification and thus constitutes a threat to the ESM's coming into operation.⁴⁶

5. Conclusion

It follows from the foregoing that the adopted change to Article 136 TFEU, allowing for the setting up of the European Stability Mechanism, leaves considerable doubts as to whether the

⁴³ Treaty Establishing the European Stability Mechanism (ESM).

⁴⁴ De Witte, [Working Paper], House of Commons (Standard Note: SN/IA/5812) (2010), p. 7.

⁴⁵ Miller, [Working Paper], House of Commons (Standard Note: SN/IA/5812) (2010), p. 6.

⁴⁶ Barrett, [Working Paper] The Institute of International and European Affairs (2011), p.11- 12.

‘simplified revision procedure’ was indeed the correct procedure for amending the Treaty. Whilst the amendment at hand will certainly reduce the vigour of the no-bailout clause in Article 125 TFEU – an important step which proved indispensable to take -, it remains a tricky question whether the amendment will suffice for all measures and actions actually envisaged by the ESM.

Dissenting from the predominant opinion amongst legal scholars, I am rather reluctant to believe in the validity of the present solution sought by the euro states. It can only be reiterated that the mandatory introduction of collective action clauses, admittedly subject to terms and conditions which are hitherto not utterly clear, can be considered to constitute an extensive stretch of the competences currently conferred upon the EU. The same is held to be true for the extension of national bond maturities once it is decided to enact them via binding EU legislation as well. In respect thereof, it will also be highly interesting to see how the German *Bundesverfassungsgericht* is going to rule on the former bailouts of Greece. Policy reasons may incite the court to decide in favour of these rescues. However, this is not to say that there will not be any ‘but’ in the judgement, restricting Germany to take part in any bailouts in the future – including those under the ESM.

There is a clear upside to the whole picture, nonetheless. This economic and sovereign debt crisis, provided it will not be the ruin of the euro area, will certainly lead to further promising integration processes within the European Union. The Member States have begun to understand the importance of a common fiscal policy in light of the troubles they currently undergo, notwithstanding whether this is desired by national voters or not. It is indeed remarkable how long the EMU has been able to survive throughout the years without such policy. As a matter of fact, the EMU is the first example of a monetary union which is not also a fiscal union.⁴⁷ It might, however, be the first example where such an undertaking fails if long-term solutions are not going to be found in due time.⁴⁸

⁴⁷ M. Bordo, *Does the euro need a fiscal union? Some lessons from history*, [Working Paper]. JEL (2011) [Retrieved via <http://shadowfed.org/wp-content/uploads/2010/10/Bordo-Euro-Needs-A-Fiscal-Union.pdf>, last visited 2nd December 2011], p. 2.

⁴⁸ *Note*: After having finished this paper, Angela Merkel and Nicolas Sarkozy announced their plans to possibly renew the EU Treaties to a larger extent; either together with all 27 Member States or alternatively only with the 17 euro Member States. Further details in this regard were not available yet. Both heads of state have also expressed their preference to prepone the coming into operation of the ESM to 2012. This will certainly be discussed extensively at the European Council meeting in a few days.

Apart from that, the very recent judgement of the German Constitutional Court in regards to the validity of the EFSF and the say the German *Bundestag* is entitled to have in deciding on dispensing any financial aid to troubled states could not be included anymore, either. Briefly speaking, the Court has ruled to dismiss the claim lodged against the aid measures – to the effect that prior bailouts are not deemed illegal-, but simultaneously hold that Parliament must be involved in future rescues. A short summary of the judgement in English may be retrieved via: <http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html>.

DECLARATION 17 ON PRIMACY: DOES IT STRENGTHEN OR WEAKEN THE SUPREMACY OF EU LAW?

Leonore De Mullewie

1. Introduction

More than forty years after the European Court of Justice (ECJ) established the principle of primacy in *Costa v ENEL*¹, its relationship with the national constitutional courts is less clear than ever. How has the debate evolved? Have the deficiencies that motivate national courts to resist recognizing the supremacy of EU law always been consistent? This paper will analyze the doctrine's conceptual development, from its birth at Luxembourg to the attempt to codify and incorporate it in Declaration 17 of the Lisbon Treaty. It will also focus on the legal consequences of this *mysterious* principle, and will also examine its unexpected political and symbolic manifestations.

The paper will begin with an outline of the principle since its first enunciation in the leading case *Costa v ENEL*². How easy has it been for Member States to concede their sovereign power to the Union? The evolution of the principle can be illuminated from two perspectives: the innovative creations of the ECJ and the troubled responses from national constitutional courts. In fact, the application of the principle has built up a dichotomy between the national courts and the ECJ over time in three ways: issues surrounding fundamental rights, the concept of *Kompetenz-Kompetenz* and the potential for conflict between national constitutions and EU law.³ It will also be demonstrated that the ECJ's ideals were far removed from legal reality.

The second part of this paper will consider the scope of the principle of supremacy in the event that the Constitutional Treaty were adopted. The legal, political and symbolic potential outcomes will be considered. Would the introduction of the principle of supremacy in a treaty have indirectly led to a form of acknowledged jurisdictional hierarchy between national courts and the ECJ? Or was there to be just a smooth *crystallization* of what had been law since the *Costa*⁴ case? To this end, this paper will focus on the extent of the codification's effects in terms of its hypothetical drawbacks and enhancements. One might distinguish two important perspectives: first, the political and symbolic implications, and second, the ambiguous element from the Member States' and ECJ's perspective. It will be demonstrated that the authors of article I-6, caught in a bind, chose to leave the article, despite it being open to contentious interpretations.

Thirdly, we will analyze the recent challenges encountered by the removal of article I-6 in the new Lisbon Treaty. The principle of primacy is now found in Declaration no. 17, which is not part of primary law, but rather, a 'pocket of flexibility' for Member States and their political perspectives. Consequently, it remains to be seen whether the pre-Lisbon Treaty controversy over the primacy of EU law over all national laws in all circumstances will continue under the Lisbon Treaty.

¹ Case 6/64 *Costa v ENEL* [1964] ECR 585

² Case 6/64 *Costa v ENEL* [1964] ECR 585

³ M. Kumm & V. Ferres Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union', 3 *Oxford Journal* 2-3(May 2005), p.474-475.

⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585

2. Evolution of the Principle

The principle of supremacy is concerned with the relationship between EU law and the national law of the Member States.⁵ More specifically, the principle holds that EU law takes precedence over any national law that conflicts with it. This was enunciated by the ECJ, for the first time, in *Costa v ENEL* in 1964, where the ECJ held that *the EEC law, because of its special and original nature, could not be overridden by national law of the Member States*.⁶ There was no reference in the EC Treaty with respect to the supremacy of EU law, nor to the hierarchical structure between the EC law (now EU law) and national laws. Instead, the European Court addressed the issue in relation to EEC law as a whole and of its effectiveness.⁷ Consequently, the principle of supremacy can be said to be a pure jurisprudential creation of the ECJ, developed and elaborated by the judges of the European Court through its decisions.

In 1970, the ECJ's finding in *Internationale Handelsgesellschaft*⁸ went a step further by expanding the scope of EU law supremacy over the national laws of Member States. After this finding, the ECJ acknowledged that all binding measures adopted by the EU would trump the entire national law, even up to and including national constitutional law. In doing so, the ECJ's judgment effectively denied the respective autonomy of jurisdictions of the Member States.⁹ It is no surprise that the judgment of *Internationale Handelsgesellschaft* sparked disagreements between national constitutional courts and the ECJ. Most courts acknowledged the principle of supremacy over ordinary national laws but held that supremacy was uncontestedly conferred from their own national constitutions, and as such, that the primacy of EU law existed within clear limits.¹⁰ In other words, the Member States were much more reluctant to concede the absolute nature and quality of the principle than its practical function.¹¹ On this matter, the German constitutional court affirmed that some parts of its constitution was inalienable (such as human rights) and were considered to prevail over EU law in a case of conflict.¹² In *Frontini*¹³, the Italian Constitutional Court expressed the same limitations to those of the German Constitutional Court, holding that the primacy of Community law (now, EU law) was based on the Italian Constitution, and not on the *acquis communautaires* of the ECJ.

The doctrine of supremacy was further developed in *Simmenthal*.¹⁴ The ECJ held that EU law takes precedence over all prior and subsequent national laws, which imposed a duty on the national courts to set aside any national law that conflicted with EU law. Following this decision, Italian courts continued to maintain the position in *Granital*¹⁵ and *Fragd*¹⁶, in which there was no acknowledgment that Community law (EU law) has primacy over the Italian Constitution, and that Italian courts retain ultimate authority when Community law (EU law) infringes fundamental rights.¹⁷ Italian courts reserve the ultimate *Kompetenz-Kompetenz*.¹⁸ In

⁵ C. Tobler & J. Beglinger, *Essential EU Law in Text*, (HVG-ORAC, 2010), p.39.

⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585

⁷ C. Tobler & J. Beglinger, *Essential EU Law in Text*, p.39.

⁸ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

⁹ N. Foster, *EU Law Directions* (2nd ed., Oxford Publishing, 2010), p. 122.

¹⁰ *Ibid.*, p. 122-123.

¹¹ See B. De Witte, *The Nature of the Legal Order*, in P. Craig and G. De Burca (eds), *The Evolution of EU Law* (1999), p. 193-205

¹² P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (5th ed., Oxford Publishing, 2011), p. 273-274.

¹³ *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372

¹⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

¹⁵ *SpA Granital v. Amministrazione delle Finanze* [1984] ICC 21

¹⁶ *SpA Fragd v. Amministrazione delle Finanze* [1989] 72 RDI

¹⁷ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (4th ed., Oxford Publishing, 2008), p. 365

summary, the principle of EU law primacy was far from *perfect*. Judges continued to resist by favouring the cherishment of their respective constitutions. Even though the creation, affirmation and development of the principle of supremacy were well endorsed in a rational progression of ECJ cases law, legal reality was not consistent. Recognition of the primacy principle was not a real obligation but rather, a mere *suggestion* from Luxembourg's judges. This was the result of an absence of a proper and defined jurisdictional hierarchy. Without a hard-edged Treaty provision, supremacy was at best *suggested* to national judges who remained free to respect it or not.¹⁹

3. *Primacy Clause: Acquiescence to Imposition*

In this context, would the Constitutional Treaty have made a difference with its codification of the primacy principle by article I-6? The paper contends that the *content* of the principle would have remained intact, but its *extent* would have been put into question. This outcome would have resulted from the fact that it would have become *conventionally materialized*.²⁰ With that state of affairs, the judges of Luxembourg would not have *suggested*, rather, they would have impliedly *imposed* their perspective in a Treaty. It is an open question whether this new *metamorphose* of the principle would have been capable of abolishing constitutional conflicts. Was the proposal a *crystallization* of an acknowledged doctrine without further effect?

Article I-6 of the Constitutional Treaty²¹ stated that: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'. Furthermore, a Declaration annexed to the Final Act of the Intergovernmental Conference stated: 'The Conference notes that article I-6 reflects existing case law of the Court of Justice of the European Communities and of the Court of First Instance'.²² It was the first time that the principle of supremacy was given an explicit constitutional and legal basis. Though, some specialists would argue that this had in fact been done to some extent in the paragraph 2 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty by the 1997 Treaty of Amsterdam.²³ According to Paragraph 2 of the Protocol, 'the application of the principles of subsidiarity and proportionality ... shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law'.

To date, it is widely recognized that the principle of supremacy is the linchpin of the ability of the Union to function properly.²⁴ Without such principle, Member States would be able to ignore any measures adopted by the EU institutions if they consider that it contradicts their economic or political interests.²⁵ As a consequence, we can question which effects the codification of the principle would have entailed. So, if the Member States had enacted a supremacy clause, would have it not resulted in what is already part of the *acquis communautaire*?

¹⁸ Cartabia, M., *Report on Italy*, in A.-M.Slaughter & al., *The European Court and National Courts, Doctrine and Jurisprudence*, (Oxford: Hart Publishing, 1998)

¹⁹ J-C Piris, *Lisbon Treaty: A Legal and Political Analysis*, (CAP, 2010), p. 81.

²⁰ E. Dubout & al., *De la primauté "imposée" à la primauté "consentie": Les incidences de l'inscription de primauté dans le traité établissant une Constitution pour l'Europe*, p.3.

²¹ Originally, the supremacy clause was formulated in art. I-10 of the draft Constitutional Treaty

²² Conference of the Representatives of the Governments of the Member States, *Declarations to be annexed to the Final Act of the IC and the Final Act*, Brussels, [6 August 2004] CIG 87/04 Add 2 (available at: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>)

²³ J-C Piris, *Lisbon Treaty: A Legal and Political Analysis*, p.80.

²⁴ See Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

²⁵ *Ibid.*

3.1 Primacy Clause: its Symbolic and Political Dimensions

At first sight, we may suppose on several grounds that even if the new primacy clause was, in terms of content, a mere codification of what was already part of the EU law, it still would have made a difference.

The question of whether article I-6 would have had a *constitutive* or a *declaratory* character depends on which perspective is considered. From the ECJ's perspective, things have always been crystal clear, even before the hypothetical primacy clause. It seems quite plausible that article I-6 had a simple *declaratory* nature for the ECJ in relation to the line of reasoning that it adopted since *Costa v ENEL*.²⁶ The wording of article I-6 would have been a mere reiteration of what the ECJ ruled in *Internationale Handelsgesellschaft*.²⁷ The maintenance of *status-quo* was further enhanced by the declaration annexed to the constitutional treaty²⁸ which stated that: 'Article I-6 reflects the existing case law of the Court of Justice of the EC and of the Court of First Instance'.²⁹

What follows from this? The ECJ would have been able to continue to opine on its version of supremacy in more legitimate way by using the text of the Constitutional Treaty. This explicit constitutional endorsement of the ECJ's primacy jurisprudence would have led to greater authority and legitimacy by abrogating the complex interpretative streams in existence since the early nineteen-sixties. In this way, codification would have strengthened the ECJ's claim for supremacy of EU law.³⁰

Furthermore, it cannot be argued that the European constitutional legislators had, before the draft of the Constitutional Treaty, tacitly endorsed the primacy of EU law. As far as the ECJ was concerned, the doctrine of primacy had been law since *Costa v ENEL*.³¹ However, the legal reality was that the Member States had never explicitly acknowledged it, despite many opportunities to qualify or to revoke it. On the other hand, judicial and legal cooperation opened the path to collective inaction by the Member States, and the application of the principle by the ECJ. To consider collective inaction a tacit consent makes sense in the case of a simple majority, but this was not the case here. In order to amend treaties, unanimous consent of all member states is required.³² In this sense, the primacy clause would have not simply been embodied in a treaty but would have been a tacit assumption that all the Member States were ready to play the game according to the same rules regarding the primacy of EU law to exist as a result of their ratification in their respective Constitutions.³³ However, would this have been defeated by the potential deficiencies that might have brought article I-6?

It is nonetheless interesting to see that the collateral effect of article I-60 would certainly have taken a bi-dimensional significance. Under this article, the Member States were explicitly allowed, for the first time, to withdraw freely from the Union. But in which way would that have affected the supremacy of EU law? It might be assumed that, to the extent that Member States can exit the Union, policy grounds suggest that they should be loyal to its principles and rules as long as they remain within it. This includes the principle that EU law has

²⁶ Monica Claes, *The National Court's Mandate in the European Constitution*, (Hart Publishing, 2006), p.676.

²⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

²⁸ Final Acts, A, Declarations concerning provision of the Constitution, I.

²⁹ D. Piqani, *Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe*, paper presented at the VII World Congress of the International Association of Constitutional law, Athens, 11-15 June 2007, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf> (last viewed 06/12/11), p.10

³⁰ M. Kumm & V. Ferres Comella, 3 *Oxford Journal* 2-3 (2005), p. 477.

³¹ Case 6/64 *Costa v ENEL* [1964] ECR 585

³² M. Kumm & V. Ferres Comella, 3 *Oxford Journal* 2-3(2005), p. 477.

³³ M. Stiernstrom, *The Relationship Between Community Law and National Law*, 5 J. Monnet/R. Schuman Paper Series 33 (2005), p. 11.

supremacy over national law.³⁴ But again, would this not lead the Member States to threaten to leave the Union if their perspective was not adopted?

Therefore and only to a certain degree would embedding a supremacy clause in the Constitutional Treaty have created a provision looking like a tightrope walker in-between political and symbolical implications, tempting to hold in its instable hands the legitimate claim that EU law is the supreme law of the Union.³⁵

3.2 Primacy Clause: Smoke and Mirrors?

Against this background, it is doubtful that the entrenchment of a supremacy clause in the Constitutional Treaty would have extinguished all forms of conflict and would have changed the European version of supremacy. As we shall see, the codification of the principle would have had no real legal effect, but rather would have amounted to a counter productive move.

The most significant, but by no means the only problem, was that the wording of article I-6 was intrinsically ambiguous.³⁶ The broad and elusive nature of the wording gave rise to two major concerns, or perhaps, *deficiencies*. Firstly, there is the unsettled issue of national constitutional checks on EU law concerning possible *ultra vires* actions of the EU. Secondly, uncertainties about the interpretation of the clause would have involved the disjuncture between the opinions of the Union and national courts to become even more troublesome.

The clause in article I-6 established that primacy would be applied in accordance with ‘the Constitution and law adopted by the institutions of the Union *in exercising competences conferred on it*’. In other words, EU legislation had primacy as long as the EU acted within its sphere of competence. To a certain extent, the article clearly stated the boundaries of the application of the principle of supremacy, but it had not clearly resolved who was to adjudicate whether EU legislation was *ultra vires*.³⁷ That reminds us the heart of the controversies in the previous jurisprudence mentioned above.

Secondly, the clause stated that EU law shall have supremacy ‘over the law of Member States’. This could have been interpreted in two ways: as operating over all national law including Member States’ constitutions or, as operating over all national law, excluding national constitutions.³⁸ One could have argued that technically, national constitutions were part of the law of a Member State. This represents the *declaratory* character of the article with respect to the ECJ’s perspective.³⁹ However, the absolute side of this legitimacy argument (as mentioned above) would have been counterbalanced by the doubtful possibility that national constitutional courts would have been persuaded to forgo previous concerns. Ultimately, is not the application and acceptance of the primacy of EU law dependent on the Member States?

Why was article I-6 drafted in such an ambiguous manner? Did its authors draft without clarity purposely, or was it an unconscious tendency? The former would seem to be the most probable answer, since it is highly doubtful that its drafters did not have the longstanding controversy about the matter in mind. It is striking to see that the ambiguity was further enhanced by the content of article I-5 (1). The provision not only reiterated that the Union shall respect national identities⁴⁰ but also that the fundamental constitutional structures of the Member States must be respected as an integral part of the national identity. Therefore, article I-5 could have been seen as an authorization to violate the principle of supremacy, which

³⁴ Ibid, p. 480.

³⁵ J-C Piris, *Lisbon Treaty: A Legal and Political Analysis*, p. 81-82.

³⁶ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (5th ed., Oxford Publishing, 2011), p. 266.

³⁷ M. Kumm & V. Ferres Comella, 3 *Oxford Journal* 2-3 (2005), p.478.

³⁸ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, p. 266.

³⁹ Monica Claes, *The National Court’s Mandate in the European Constitution*, p. 673.

⁴⁰ As stated in Article 6(3) TEU

imposes a limitation on its absolute character. As a result, the Constitutional Treaty, as surprising as it may seem, attempted to codify the principle of supremacy as a *qualified* principle. Would this system of counterbalance between national concerns for the preservation of national constitutional identities and the absolute European claim of supremacy have contributed in preventing hostility in constitutional dialogues between national constitutional courts and the ECJ? This was the line of reasoning that France and Spain have adopted in their *a priori* decisions concerning the introduction of the primacy clause.⁴¹ In its decision, the French constitutional court stated: ‘the close proximity of articles I-5 and I-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of primacy of Union law as duly acknowledged by article 88-1 of the Constitution, and confirmed by the Constitutional Council in its decisions referred to hereinabove [...]’. On the same line, the Spanish court concluded that primacy clause was already present in its own Constitution and that it required no further modification.⁴²

This proves that the primacy clause was just theoretically a *mere* representation of the status quo. There lies the heart of the problem. Why would you *impose* potential source of conflict in a Treaty provision on a matter that is already inherently induced? This, all the more since, the Constitutional Treaty was far away to provide any conclusive reasons and symmetrical provision for domestic courts to accept the supremacy of EU law over their legal perspectives and their national constitutions. In this sense, article I-6 was even counter-productive since it would have not unveiled the many questions concerning the relationship between the law in the Members States and the EU law. Instead, article I-6 was clearly a definitive retreat from an absolute version of supremacy rather than its strengthening. Some might even say that its codification would have brought unnecessary discussions and cases on a principle that was already deeply rooted as such in the Union law.⁴³

4. Primacy: From Codification to Declaration

The Constitutional Treaty failed to enter into force following the negative outcome of the referenda in France and the Netherlands in 2005.⁴⁴ Three years later, against all odds, a new Treaty, the Lisbon Treaty, entered into force. This new Treaty replicated many of the changes that would have been implemented by the Constitutional Treaty. Unsurprisingly, the Lisbon Treaty sidestepped the direct expression of the primacy principle that was contained in the controversial article I-6 of the Constitutional Treaty. Without real legal consequences, article I-6 was dropped at the request of several Member States opting for an evolutionary, rather than, revolutionary progress of the rules of supremacy.⁴⁵ On the same token, the European Council in 2007 held that sidestepping article I-6 would ‘diminish the *constitutional character*’ of the Lisbon Treaty.⁴⁶

Declaration 17 confined the principle as follows: ‘The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the

⁴¹ D. Piqani, paper presented at the VII World Congress of the International Association of Constitutional law, Athens, 11-15 June 2007, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>, (last viewed 06/12/11), p.12.

⁴² In France, see Decision of the Conseil constitutionnel no. 2004-505 DC of 19 November 2004. In Spain, see Decision of the Tribunal Constitucional, no. DTC 1/2004 of 13 December 2004.

⁴³ M. Stiernstrom, 5 *J. Monnet/R. Schuman Paper Series* 33 (October 2005), p. 10.

⁴⁴ J. Fairhurst, *Law of the European Union* (8th ed., Pearson, 2010), p. 26.

⁴⁵ Dr. Edward Best, *After the Constitutional Treaty: Reasoning Rather Than Rushing*, EIPASCOPE 2007/1 (available at: http://www.eipa.eu/files/repository/eipascope/20070622100219_ebeSCOPE2007-1_internet-2.pdf - last viewed 06/12/11)

⁴⁶ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, p. 266-267.

law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law’.

This leaves open the status of the primacy principle under the Treaty of Lisbon.⁴⁷ After all, can we now say that Declaration 17 is just a political relief for the skeptical Member States, or will it have a narrower application than what it literally states? It has been demonstrated in this paper that there is dichotomy between what is explicitly written in a juridical text and what is not, and that this is largely questionable from both a theoretical point of view and a practical one. In this context, will the pre-Lisbon Treaty controversies relating to supremacy of EU law in all circumstances, and over all national laws, continue under the Lisbon Treaty?

Once again, the move from codification to its enshrinement in a Declaration has not changed the theoretical content of the supremacy rule. This was expressly confirmed in the Opinion of the Council Legal Service⁴⁸ which recalls that ‘The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice’.

In fact, the practical implications evoke *déjà vu*. It can be said that the Declaration suffers from the precisely the same deficiencies that have traditionally motivated national courts to resist recognizing the unqualified primacy of EU law. Its wording is as vague as article I-6 in the Constitutional Treaty, as it is framed in terms of EU law having ‘primacy over the law of the Member States’.⁴⁹ What changes is that Declaration 17 is a non-binding political agreement, which of course, on one hand, backs the ECJ in its espousal of primacy, but also retreats from the codification of a *qualified* principle as suggested in the Constitutional Treaty.⁵⁰ Therefore, the divergence of views between Member States and the EU will likely continue under the new legal order of the Lisbon Treaty. Neither of the opposing forces will be eager to re-exhume the issue.⁵¹

Moreover, there is nothing to suggest that Declaration 17 has solved the pre-Constitutional draft concerns relating to the *Kompetenz-Kompetenz*, fundamental rights’ and conflicts with specific provisions of national constitutions. Though it has been held in *Solange*⁵², that the ‘actual probability of future fundamental rights’ concerns is very low’ as the level of protection found in jurisprudence was found to be satisfactory, the two other grounds are still more than ever disputed. The Treaty thus not moves beyond the status quo.⁵³

Declaration 17 has, in fact, strengthened the supremacy principle in avoiding its *qualified* enshrinement and allowing the smooth path to the acceptance of its absolute nature by changing the legal quality of the relation between the Member States and the Union.⁵⁴ Is it not better to have a *political consensus* rather than a *subjectively threatening legal imposition*?

5. Conclusion

It might be argued that the removal of article I-6 from the Lisbon Treaty was relatively dangerous, because it might have led national courts to doubt the validity of the supremacy principle by holding that the ECJ’s long-standing view on primacy has lost its *symbolic* sense along the way. This is not likely however for two reasons. Firstly, because as the ECJ stated

⁴⁷ Ibid.

⁴⁸ Opinion of the Council Legal Service of 22 June 2007

⁴⁹ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, p. 266-267.

⁵⁰ Monica Claes, *The National Court’s Mandate in the European Constitution*, p. 676.

⁵¹ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, p. 267.

⁵² *Solange I* [1974] 2 CMLR 540, see also *Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 225

⁵³ S. Griller & J. Ziller, *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*, (Springer-Verlag Wien, 2008), p. 48.

⁵⁴ Ibid.

in *Simmenthal*⁵⁵, ‘in the absence of supremacy, Community itself would be called in question’. Therefore supremacy was, has been and will be the keystone of the functioning of the EU. Secondly, any such danger is largely outweighed by the hypothetical deficiencies of the primacy clause, namely, its *qualified* nature and its ultimate trend towards controversial interpretations.⁵⁶ After all, it is now certain that the framers of article I-6 were not prepared to endorse the consequences of codifying an unconditional primacy clause - fearing constitutional crisis.⁵⁷

The discrepancy between national courts and the ECJ has essentially been problem of principle, both legally and politically, but it *has had no practical impact up to now*⁵⁸. This because national courts have not only relied on the straightforward rule of national constitutional supremacy, with their reserve to accept the unqualified supremacy of EU law, they have also acted on a concrete presumption that EU law should be applied in case of conflict⁵⁹. If the primacy clause had been brought into the picture, this would have changed.

We may then conclude that Declaration 17 has strengthened the principle of supremacy from being one of *silent acceptance* or *controversial consented imposition* to *peaceful acknowledgement*. It is now acknowledged, from past experiences, that the acceptance and application of supremacy is dependent on the Member States and not entirely on the ECJ. Neither the introduction nor the removal of article I-6 would change anything to the practical legal situation, albeit this removal had political consequences, by creating the impression that it has been the case and thus favoring smooth reasoning rather than rushing.⁶⁰ Declaration 17 leaves the debate open. The ECJ will continue to believe in its rubber-stamped absolute principle whereas, the Member States’ unnecessary fears will be avoided. And after all, are not symbolic and political convictions the driving force of legal application?

⁵⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

⁵⁶ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials*, p. 266.

⁵⁷ Ibid, and D. Piqani, paper presented at the VII World Congress of the International Association of Constitutional law, Athens, 11-15 June 2007, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>, (last viewed 06/12/11), p. 11.

⁵⁸ J-P. Jacqué, *Droit constitutionnel de l’Union Européenne* (5th ed), (Dalloz, 200), p. 573-587.

⁵⁹ M. Kumm & V. Ferres Comella, 3 *Oxford Journal* 2-3 (2005), p. 474.

⁶⁰ Dr. Edward Best, *After the Constitutional Treaty: Reasoning Rather Than Rushing*, EIPASCOPE 2007/1 (available at: http://www.eipa.eu/files/repository/eipascope/20070622100219_ebeSCOPE2007-1_internet-2.pdf - last viewed 06/12/11)

ARTICLE 4(2) TEU: THE END OF THE SUPREMACY OF EU LAW?

Vivian Bom

1. Introduction

This paper examines whether the obligation of the Union to respect the national identities of the Member States as stated in Article 4(2) in the Treaty on the European Union undermines the supremacy of EU law.

I have chosen not to look at the rulings of the national (constitutional) courts, because ultimately the European Court of Justice has the competence to interpret Union law. I realize that the national courts have given their own interpretations on Article 4(2), but for this paper it is more relevant how the respect for national identities is interpreted on a Union level, than on a national level.

First, this paper will address the Article itself, trying to find the meaning of this Article by looking into the history and the limits imposed on it by the Treaty itself. Second, this paper will discuss who decides whether there is a breach of the Article, and who is to judge on what constitutes a national identity. Third, this paper will address some case law of the European Court of Justice, trying to find out how the ECJ has dealt with the national identities of the Member States in the past. Fourth, this paper will discuss what can be concluded from the judgments of the ECJ discussed in the previous part. With this part I will try to find out what Article 4(2) means according to the ECJ. In the final part a conclusion will be drawn and the question will be answered whether, in practice and theory, Article 4(2) undermines the supremacy of EU law.

2. The Limits of Article 4(2)

Article 4(2) TEU¹ ensures that the Union respects the equality of the Member States and their national identities. It defines national identities as political and constitutional structures. This article also ensures the respect of the Union for the essential state functions of the Member States and states that national security remains the sole responsibility of the Member States.²

The respect for national identities is not new in the Lisbon Treaty. The Treaties of Maastricht and Amsterdam already stated that ‘The Union shall respect the national identities of its Member States.’³ In this treaty however, the term national identities was not explained further. Apparently in the Lisbon Treaty there was the need to define what constitutes the national identity of a Member State. By the description given in the Article, it seems that national identity means constitutional and political identity. Because the Treaty protects this constitutional and political identity the question rises, whether Member States can use their constitution to undermine the supremacy of EU law.

Article 4(2) however, does not stand on its own. Article 4(1) states that competences not conferred upon the Union, remain with the Member States,⁴ and Article 4(3) ensures the principle of sincere cooperation of the Member States and the institutions of the Union.⁵ From this, especially from Article 4(3), it could be concluded that the respect for national identities is limited, or at least that a balance has to be struck between the respect for national identities

¹ Art. 4(2) Consolidated Treaty on the European Union [2010] OJ C83/01.

² Ibid.

³ Art. F(1), Treaty on European Union (Maastricht Treaty) [1992] OJ C 191.

⁴ Art. 4(1), TEU.

⁵ Art. 4(3), TEU.

by the Union and the obligation for the Member States to ensure the principle of sincere cooperation.

Article 4(3), does however not only ensures sincere cooperation for the Member States. This Article is also applicable to the Union. Looking at this Article from that perspective, it may strengthen Article 4(2), because it ensures, when read in conformity with Article 4(2), that the Union has to respect the national identities of the Member States.

In Article 3(3) TEU,⁶ it is stated that the Union ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.’⁷ This Article seems to refer to the cultural identity of the Member States. Therefore one could argue that the cultural identities of the Member States do not fall under the national identities of Article 4(2). However, Article 4(2) does refer to constitutional and political identities and these identities are often formed because of the cultural identity of a Member State. Because the cultural identity of a State is often inherent in the political and constitutional identity, it is not possible to exclude the cultural identity of a Member State from the national identity of that State.⁸

In the Treaty of Maastricht the sub-article on the respect for the national identities was part of an article that also stated the principles on which the Union is founded⁹ and which ensured the respect of the Union for fundamental rights in the European Convention on the Protection of Human Rights and Fundamental Freedoms.¹⁰ In the Treaty of Lisbon the values on which the Union is founded are stated in Article 2¹¹ and thus are not part of the same article anymore. However, Article 2 does state that these values are common to the Member States,¹² and thus it can be concluded that these values form a part of the national and European identity of the Member States. From this it can be concluded that not just any national identity of a Member State is accepted by the Union, since this identity cannot go against any of the values mentioned in Article 2.^{13 14}

Another limit is imposed by Article 4(2) itself. The Article ensures the respect for national identities by the Union, but it does not define a hierarchy between Union law and national law. Therefore this Article does not mean that the national identities of the Member States are put above Union law, or the other way around, that Union law is put above the national identities of Member States. The wording of the Article itself implies, that whenever there is a conflict between Union law and the national identity of a Member State, this Union law and the national identity of that Member State have to be balanced, and a proportionate outcome has to be sought.¹⁵

3. *Who is the Judge?*

From the previous part it has become clear that the respect for the national identities of the Member States by the Union has its limits. The next question is then, who is to judge on

⁶ Art. 3(3) TEU.

⁷ Ibid.

⁸ L.F.M. Besselink, ‘National and constitutional identity before and after Lisbon’, 6 *Utrecht law review* 3 (2010), p. 44.

⁹ Art. 6(1), Consolidated Version of the Treaty on European Union [2002] OJ C325/1-184.

¹⁰ Art. 6(2), Ibid.

¹¹ Art. 2 TEU.

¹² Ibid.

¹³ Ibid.

¹⁴ S. Rodin, ‘National identity and Market Freedoms after the Treaty of Lisbon’, UACES Conference Exchanging Ideas on Europe, Cambridge (2011), p. 5; to be found at <http://www.uaces.org/pdf/papers/1101/rodin.pdf>.

¹⁵ A. von Bogdandy, ‘Overcoming absolute supremacy: Respect for national identity under the Lisbon Treaty’, 5 *Common market law review* 48, (2011) p. 1441.

whether there is an infringement of Article 4(2). When first posing this question, the answer seems clear. This Article is in the Treaty of the European Union, the ECJ has the competence to interpret Union law,¹⁶ so the ECJ should be the one to ultimately judge whether there is an infringement of this Article. However, when looking more closely, the answer to the question is not so straightforward. To establish whether Article 4(2) has been infringed, one would have to establish what the national identity of a Member State is. To be able to do this, one would have to interpret the laws of the Member State, and this does not fall within the competences of the ECJ,¹⁷ but is up to the Member States. The ECJ has the competence to interpret the meaning of the word national identity as used in the Treaty, but it does not have the competence to establish for the Member States what the national identity of that Member State is according to their national laws. Therefore the Member States have the power to determine what their national identity entails on the basis of their national laws, while the ECJ has the power to judge whether that national identity is infringed by Union law.¹⁸ This may seem to undermine the supremacy of Union law, because by this argumentation, a Member State could construe its national identity to be of such kind that every piece of Union legislation would go against their national identity, but the ECJ does have the competence to limit the word national identity as used in the Treaty, and the Member States are under the obligation to take these limits into account. Another reason why, by arguing this way, supremacy of Union law is not automatically undermined, is that it tells us nothing about the legal effects of Article 4(2). The supremacy of Union law would only be undermined if the obligation for the Union to respect the national identities of Member States, leads to Member States derogating from, or restricting Union law, when Union law does not respect the national identity of a Member State. Therefore before concluding whether Article 4(2) undermines the supremacy of Union law, it first has to be examined what effects are given to this Article by the ECJ.

4. Case Law of the ECJ

Several cases dealing with Union law, infringing the national identity of a Member State, have been brought before the ECJ. In 1970 the ECJ stated in the *Internationale Handelsgesellschaft* case¹⁹ that ‘the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.’²⁰ The Court continues with acknowledging that the protection of fundamental rights form an integral part of Union law and that these rights are inspired by a constitutional tradition, common to the Member States. The Court is however in this case not examining whether a piece of Union law goes against German fundamental rights, but whether it goes against European fundamental rights.²¹ From this case it becomes clear that in 1970 the national identities of Member States were not respected by the ECJ. States could not disregard Union law because of their national identities. In later cases the ECJ used the same line of reasoning.²² In the *Flemish Government* case²³ the ECJ stated ‘the

¹⁶ Art. 19(3)(b), *Ibid.*

¹⁷ Art. 19(3) TEU and established case law of the ECJ.

¹⁸ L.F.M. Besselink, 6 *Utrecht law review* 3 (2010), p. 45.

¹⁹ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

²⁰ *Ibid.* at para. 3.

²¹ *Ibid.* at para. 4.

²² S. Rodin, ‘National identity and Market Freedoms after the Treaty of Lisbon’, p. 10.

²³ Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683.

Court has consistently held that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law'.²⁴

However, in the *Omega* case,²⁵ the Court argued differently. In this case the German company Omega claimed, among other things, that the prohibition of certain laser games by the police in a state in Germany, was contrary to the Union law on the free movement of services. Germany justified the infringement of the free movement of services by claiming that these laser games 'infringed a fundamental value enshrined in the national constitution, namely human dignity',²⁶ this was, according to the Court, based on the public policy justification.²⁷ In its judgement the Court recognized human dignity as a general principle of Union law. The Court continues its argumentation by stating that '[t]here can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.'²⁸ The Court also argues that the restrictions used to protect human dignity does not need to be common to all Member States.²⁹ The Court uses the proportionality test to assess whether the German measure to protect human dignity was proportional to the restriction of the free movement of services. While assessing the proportionality of the measure the Court takes into account that according to the referring German court, the measure 'corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany.'³⁰ This case shows that, even though the Court first recognizes human dignity as a European principle, it also recognizes that there is a German principle of human dignity and takes into account the German constitutional protection of this principle when assessing the proportionality of the measure.³¹ The Court does however not refer to the respect of national identities, but justifies the German restriction solely on the basis of the protection of public policy.

In the *Sayn-Wittgenstein* case³² the Court did refer to Article 4(2).³³ In this case the Austrian authorities refused to register the name Fürstin von Sayn-Wittgenstein. Ilonka Fürstin von Sayn-Wittgenstein is an Austrian national who obtained her last name by adoption. She was adopted by a German national whose last name was Fürst von Sayn-Wittgenstein, and by the adoption Ilonka became Fürstin von Sayn-Wittgenstein. However, in Austria all noble titles had been abolished and according to the Austrian law a last name that implied a noble title could not be registered. According to the Court this was an infringement of Article 21 TFEU. Austria argued that this infringement could be justified on the grounds of public policy. The Court agreed that public policy could be a justification, but only if 'there is a genuine and sufficiently serious threat to a fundamental

²⁴ Ibid. at para. 58.

²⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn* [2004] ECR I-9609.

²⁶ Ibid. at para. 32.

²⁷ Ibid. at para. 28.

²⁸ Ibid. at para. 34.

²⁹ Ibid. at paras. 37,38.

³⁰ Ibid. at para. 39.

³¹ Dr. S.A. de Vries, 'The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony', The Europe Institute of Utrecht University Working Paper 4/10, p. 11, to be found at [http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_RGL/REBO_RGL_EUROPA/Working_Paper_de_Vries\[1\].pdf](http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_RGL/REBO_RGL_EUROPA/Working_Paper_de_Vries[1].pdf).

³² Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010], not yet reported.

³³ Ibid. at para. 92.

interest of society.’³⁴ According to Austria, the abolition of noble titles implements the principle of equal treatment.³⁵ The Court recognizes this as a fundamental right and as a general principle of law, compatible with Union law.³⁶ The Court applies the proportionality test, just as in *Omega*, and states that ‘[i]t must be noted that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.’³⁷ The Court continues that in this case the Austrian restriction does not seem to be disproportionate.³⁸

In this case, the Court recognizes the obligation of the Union to respect the national identity of Austria, but by the reasoning of the Court it seems that if the justification was based on a principle not recognized as a fundamental right under Union law, or as a general principle of Union law, it would not have been accepted by the Court.

In *Runevič-Vardyn*³⁹ the ECJ also referred to Article 4(2). In this case a woman wanted the spelling of her name altered on her Lithuanian birth- and marriage certificate, but by this change her name would contain letters that did not exist in the Lithuanian alphabet. The Lithuanian government refused this, and the ECJ recognized that this refusal is contrary to Article 21 TFEU. The Court also recognized that the protection of the national language of a State is part of its national identity and that the Union has to respect this national identity according to Article 4(2). As in the *Sayn-Wittgenstein* case, the Court stated that the infringement of Article 21 TFEU could be justified on the grounds of public policy, but that this has to be proportional. So in this case, as in the *Sayn-Wittgenstein* case, a justification on the basis of public policy is possible because the Union has to respect the national identity of the State according to Article 4(2), as long as the restriction is proportionate.

There are however two differences between these cases. First, in the *Sayn-Wittgenstein* case the Court first identifies human dignity as a European principle of law and European fundamental right before taking Article 4(2) into consideration, while in *Runevič-Vardyn* the Court does not talk about a European principle of law or European fundamental right that could be a justification, but primarily considers the respect for national identities itself as a justification. Because of this, it seems that for Article 4(2) to be invoked by a Member State it is not necessary that the national identity that is to be respected entails a European principle of law or European fundamental right. This is logical, since the protection of national language in the latter case cannot constitute a European fundamental right or principle of European law. Second, in the *Sayn-Wittgenstein* case, the Court comes to the conclusion that the restriction seems to be proportional, while in *Runevič-Vardyn*, the Court lays down some guidelines as to how the proportionality test should be conducted, but leaves it up to the national court to decide whether the restriction is proportional or not.

There are two other interesting cases concerning a conflict between national constitutional law and Union law. The first one is the *Michaniki* case,⁴⁰ in which a Greek constitutional law was in conflict with a Directive. The Directive constituted an exhaustive list of justifications to exclude a contractor from an award procedure. On the basis of the Greek constitution, Greece wanted to exclude contractors from this award procedure on a ground not listed in this exhaustive list. The Court recognized that it could be possible to invoke

³⁴ Ibid. at para. 86.

³⁵ Ibid. at para. 87.

³⁶ Ibid. at para. 89.

³⁷ Ibid. at para. 92.

³⁸ Ibid. at para. 93.

³⁹ Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011], not yet reported.

⁴⁰ Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-9999.

this constitutional provision and exclude those contractors from the award procedure, but then found that this would be disproportional.⁴¹

The second case is *Commission v Poland*,⁴² in which Poland claimed that it was not in breach of an EU Directive, because of national provisions. These national provisions were, according to Poland, based on protecting the ethical and religious considerations of Poland,⁴³ and on the basis of these provisions the justification of protecting public morality for the breach of the Directive was invoked by Poland.⁴⁴ The Court does not consider whether the protection of ethical and religious considerations can justify a derogation of an EU Directive by a Member State.⁴⁵ It comes to the conclusion that 'it is sufficient to hold that the Republic of Poland, upon which the burden of proof lies in such a case, has failed, in any event, to establish that the true purpose of the contested national provisions was in fact to pursue the religious and ethical objectives relied upon.'⁴⁶

From the *Michaniki* case it can be concluded that the ECJ recognizes that constitutional provisions of a Member State are not automatically to be put aside if they conflict with a Directive. This judgment even suggests that it may be justified for a Member State to disregard parts of Directives, if these conflict with constitutional laws, as long as the result is proportional.⁴⁷ From *Commission v Poland* it can be concluded that the Member State has to prove that the constitutional provisions used to justify from the derogation of a Directive were adopted to protect the national identity of that State, but this judgment also shows that the Court is willing to look at the possibility for Member States to derogate from Directives if this goes against the constitution of this State.⁴⁸

5. Conclusions Drawn from the Rulings of the ECJ

From the case law of ECJ it can be concluded that the obligation to respect the national identities of its Member States can give the Member States a justification to derogate from Union law, but only in exceptional circumstances. As implied in *Omega* and the *Sayn-Wittgenstein* case, if the justification for restriction is based on fundamental rights, the ECJ will first determine whether these national fundamental rights are European fundamental rights or principles of European law. As also mentioned in the first part of this paper, national fundamental rights that go against European fundamental rights will probably not be accepted by the ECJ as a justification for the restriction of Union law.

What has become evident in all cases, is that whenever a Member State wants to invoke the justification on the grounds of respect for the national identities, this justification has to be based on the protection of public policy or public morality or, possibly on other justifications well known in Union law such as for instance, public security. Another similarity between the cases is that the derogation from, or restricting Union law, is only possible if this is proportional, which is, as explained in the first section of this paper, already evident from the wording of Article 4(2). It also seems that national identity means the same as constitutional identity, since all cases dealt with constitutional provisions being in conflict with Union law. However, the ECJ has never given a definition of the term national identity.

⁴¹ A. von Bogdandy, 5 *Common market law review* 48, (2011), p. 1444.

⁴² Case C-165/08 *Commission v Poland* [2009] ECR I-6843.

⁴³ Ibid. at para. 49.

⁴⁴ Ibid. at para. 54.

⁴⁵ Ibid. at para. 51.

⁴⁶ Ibid. at para. 52.

⁴⁷ A. von Bogdandy, 5 *Common market law review* 48, (2011), p. 1445.

⁴⁸ Ibid.

The case *Commission v Poland* has shown that it is not enough for a Member State to claim that constitutional provisions used to justify a derogation from Union law, protect a part of the national identity of that State. This case has shown that this claim has to be proven, before the ECJ will even consider the validity of the justification.

6. Conclusion

The ECJ has made, by its case law, somewhat clear what the test is when assessing whether Article 4(2) has been infringed or not. Even though it has only in a few cases referred to this specific Article, or used the wording national identities or constitutional identities, it has become clear, that under certain circumstances, Member States are allowed to derogate from Union law, or to restrict Union law. The Court has however not specified what these certain circumstances are, and what constitutes a national identity of a Member State and what does not. It is for instance not clear whether a constitutional provision that protects a fundamental right, which is not recognized by the Court as a European fundamental right, will be allowed as a justification to derogate from, or to restrict Union law. It is also not clear how the obligation for the Union to respect the national identities of the Member States relate to the principle of sincere cooperation for the Member States. But, since the Court has recognized in *Omega*, the *Sayn-Wittgenstein* case and in *Runevič-Vardyn* that Member States can be allowed to restrict Union law because the national identities of the Member States have to be respected by the Union, it can no longer be claimed that Union law has absolute supremacy. In some cases the constitutions of the Member States go before Union law when they are in conflict. However, how far this supremacy is restricted by Article 4(2) in practice, remains a question without an answer.

ARTICLE 4 (2) TEU: DOES THE PROTECTION OF NATIONAL CONSTITUTIONAL IDENTITIES UNDERMINE EU SUPREMACY?

Anne Tschentscher

1. Introduction

For many years the European machinery has been surging ahead with considerable speed¹. The peaceful environment we, the European people, experience today might seem unexceptional, at times it might even be forgotten that it hasn't always been this way². That peace was the ultimate drive towards establishing what now often appears to be an inscrutable apparatus of ever increasing power³.

The European Union was probably the best that could have happened to this continent. But time passed and power structures shifted. Nations now fear a daemon which they feel is encroaching upon their liberties and national identities⁴. The failure of the Constitutional Treaty was a considerable blowback for the process of Europeanization. And resistance could not only be found in France and the Netherlands where the negative Referenda took place. The next step within the integrationist framework required finding a way to overcome skepticism and the fear of losing identity. In the multi-layered complex constituting the European Union the questions on allocation and exercise of competences between the Union and the Member states plays a crucial part. The answers are the principles of conferral, subsidiarity, proportionality as well as the promise to loyalty and the duty to respect national identities⁵.

This paper will focus on Article 4 (2) TEU and will consider the question whether the promise to respect national identities constitutes a possible way to set limits to European supremacy. In order to answer the aforementioned question Section 2 will examine how European sovereignty developed over time and who the Union itself as well as the Member States believe to hold ultimate authority. Section 3 will consider the historical development of Article 4 (2) TEU until the Lisbon Treaty and Section 4 will take a closer look at the concept of national identity and explore in how far its scope coincides with its usage in Article 4 (2) TEU. Section 5 will then finally look at the legal effects of Article 4 (2) TEU and examine possible consequences.

2. EU Sovereignty and the Member States' Point of View

European integration requires a certain degree of trust and acceptance by the Member States. This does not sound groundbreaking, but at the time when today's European Union came into existence, trust and tolerance were the main objectives in order to overcome mutual distrust

¹ The author refers to the establishment and development of the European Union. It has its origin in the 1951 created European Coal and Steel Community (ECSC), consisting of six states and now finds itself being a political and economic Union of 27 independent Member States governed since 2009 by the Lisbon Treaty.

² N. Foster, *EU Law Directions*, (Oxford University Press, 2010), p. 5.

³ It is referred to the increasing power of the European Union which has not explicitly been given to it by the Member States, but which was developed in case law by the ECJ in decisions such as *Van Gend en Loos* or *Costa/ENEL*.

⁴ M. Cini and N. Pérez-Solórzano Borragán, *European Union Politics*, (Oxford University Press, 2010), p. 397-404.

⁵ A. Vorndran, *Art. 4 und 5 EUV n. F. – Zum Schutz der Kompetenzabgrenzung- und ausübung* (GRIN Verlag, 2009), p. 1.

between France and Germany⁶. Further integration was seen as necessary to prevent conflict and war and to achieve peace⁷. International law knows such political communities that create treaties to achieve a common goal, but at the end of the day it will be the states that remain sovereign. This traditional conception was also believed to be used for the European Community, but it wouldn't turn out to be this way⁸.

Integration was based on the idea of *supranationalism*, the construction of a Europe which would be above all its Member States, whose nationalism at that time was believed to be highly destructive⁹. *Van Gend en Loos* and the *Costa* case developed a new legal order by limiting the sovereign rights of the Member States¹⁰. Concerning the point in time when this doctrine of supremacy developed it appears to be quite early, as during the sixties and seventies the basic competences of the Union were still those of agriculture, the common commercial policy as well as competition policy and the internal market¹¹.

But over time the ideas of how integration should continue shifted towards *intergovernmentalism*, so more control was given to the national governments again¹². And this came along with another phenomenon, namely *Euroscepticism*, of which the Maastricht Treaty can be regarded as displaying a certain degree¹³. This development came into the open i.e. by the fact that the number of Eurosceptic parties within the European Parliament and also within the Member States was growing¹⁴. One reason for this skepticism in the population is that the citizens of the European Union are of the opinion that European integration means the loss of national identity, how recent studies show. To clarify this, an example of a Eurobarometer from 2006 can be mentioned. It shows that UK citizens are among those most afraid of losing their national identity, with over 60% being afraid, whereas the average was 39%¹⁵. These developments show that diversity was and still is a matter of great importance.

Nevertheless it can be argued that there is remarkable obedience of the Member States regarding European obligations¹⁶. Such obligations can be to apply Union law instead of the respective national law in case the latter is contrary to Union law and enacted later in time. Or there is the obligation not to disregard Union law in case it conflicts with national constitutional law¹⁷. As the enforcement of EU law is a matter left to the national courts, the Union couldn't do without them.

Interestingly the national constitutional courts do not regard themselves to be obliged to accept EU law because Union law imposes such a duty on them, but because their respective constitutions themselves authorize such effect¹⁸. To give but a few examples, the UK finds the basis concerning the applicability of EU law in the 1972 Act, Ireland sees the European Community Act as its ground for justification; Denmark also has a national statute

⁶ L. Besselink, "National Identity before and after Lisbon", *Utrecht Law Review* 6 (2010), p. 37.

⁷ Foster, *EU Law Directions*, p. 5.

⁸ D. Chalmers, *European Union Public Law*, (Cambridge University Press, 2010), p. 185-186.

⁹ Besselink, *National Identity before and after Lisbon*, p. 39.

¹⁰ N. Foster, *EU Law Directions*, p. 119-120.

¹¹ G. Beck, „The Lisbon judgment of the German Constitutional Court, the primacy of EU law and the problem of *Kompetenz-Kompetenz*: A conflict between right and right in which there is no *preator*“, *European Law Journal* 17 (2011), p. 489.

¹² Cini and Borragán, *European Union Politics*, p. 86-90.

¹³ Besselink, *National Identity before and after Lisbon*, p. 40.

¹⁴ I. Aronstein, “‘The Union shall respect cultural diversity and national identities’ Lisbon’s concessions to Euroscepticism – true promises or a booby-trap?”, *Utrecht Law Review* 6 (2010), p. 91.

¹⁵ Cini and Borragán, *European Union Politics*, p. 399.

¹⁶ W. Phelan, “Political Self-Control and European Constitution: The Assumption of national political loyalty to European obligations as solution to the *lex posterior* problem of EC law in the national legal orders”, *European Law Journal* 16 (2010), p. 253.

¹⁷ *Ibid*, p. 254.

¹⁸ J. Gerards, “Pluralism, Deference and the Margin of Appreciation Doctrine”, *European Law Journal* 17 (2011), p. 83.

implementing the European Treaties as well as Article 20 of the Danish Constitution and lastly also Germany founds the application of EU law on the *Zustimmungsgesetz*¹⁹ together with Articles 23 and 24 (1) of the German Constitution²⁰. This attitude is reflected in the case *Brunner v European Union Treaty* where Germany refers to itself as the “Masters of the Treaties” that has deliberately given powers to the Union, but could also just implement an act with the opposite effect²¹.

It can be seen that those national constitutional courts all found a way to accept the power the EU has and those approaches have been categorized into European constitutional sovereignty, national constitutional sovereignty and constitutional tolerance²². The first category, European constitutional sovereignty, would refer to those Member states that unconditionally accept EU supremacy, but at the time no national constitutional court can be found to belong to this category. The second category, unconstitutional sovereignty, denies EU sovereignty, but regards the national constitutional courts as sovereign. An example to be found within this category is Poland, whose Constitutional Tribunal declared absolute supremacy of Polish law over Community law²³. The last category, constitutional tolerance, is a position taken by most Member States in which they recognize the special status of EU law as they consider it not to violate their constitutional foundation, but they nevertheless see themselves as being able to ultimately decide on the question of authority.

This position is taken by Germany and the details are elaborated in the case *Gauweiler v Treaty of Lisbon*²⁴, which is in most literature only referred to as the Lisbon judgment. Here it was held by the German Constitutional Court that a violation of the constitutional identity which is codified in Article 79.3 of the Basic Law would constitute an infringement of constituent power which is given to the people. Furthermore it is stipulated that sovereign powers are granted to the European Union only if inter alia the Member States’ constitutional identity was protected and that its sovereign statehood was maintained.

So what is the position of the Court of Justice of the European Union? It regards itself as the ultimate arbiter when it comes to scope, validity and interpretation of EU law, as supremacy does not only include the Treaty articles but also secondary legislation such as case law. The question of who limits EU legislative competence, the ECJ on the basis of supremacy or the national constitutional courts of the Member States is referred to as *Kompetenz-Kompetenz* and has given rise to much debate²⁵.

The Member States underline their point of view by raising the issue of democracy. It can be argued that the primacy of national constitutional law can only be evaded by creating a European Constitution. One reasoning is that until such time as a European people would come into existence, the only way to legitimize democracy is to regard the Member States as possessing sovereignty, at least concerning the most essential fields²⁶.

This section shows that the principles of sovereignty and primacy of EU law have to be seen from different perspectives and it also becomes clear that an ultimate solution has not yet been found. Nevertheless those various judicial claims might be able to be mediated. One possibility could be found in Article 4 (2) TEU²⁷.

¹⁹ The German Act implementing EU law

²⁰ Phelan, *Political Self-Control and European Constitution: The Assumption of national political loyalty to European obligations as solution to the lex posterior problem of EC law in the national legal orders*, p. 258-263.

²¹ *Brunner v European Union* [1994] 1 CMLR 57, para. 55.

²² Chalmers, *European Union Public Law*, p. 190-194.

²³ K. Kowalik-Banczyk, “Should we Polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU law”, *German Law Journal* 6 (2005), p. 1365.

²⁴ *Gauweiler v Treaty of Lisbon* [2009] 2 BvE 2/08

²⁵ Beck, *The Lisbon judgment of the German Constitutional Court, the primacy of EU law and the problem of Kompetenz-Kompetenz: A conflict between right and right in which there is no preator*, p. 471.

²⁶ *Ibid*, p. 475.

²⁷ Chalmers, *European Union Public Law*, p. 201.

3. *Historical Development of Article 4(2) TEU*

The foundation for today's Article 4 (2) TEU can be found in Article 5 of Section 1 of the Treaty establishing the European Economic Community (EEC), which dates back to 1958. Here the Member States were asked to facilitate the achievement of the Community aims. In the Maastricht Treaty under Article F (1) the Union is then called to respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. This imperative gained status after the Amsterdam Treaty came into force in Article 6 (3). And also the Constitutional Treaty addressed the relationship between EU law and constitutional law directly in Article 1-6²⁸. Today it reads in Article 4 (2) TEU:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

The development which can be seen is that the earlier versions of the so-called identity clause did not fall within the jurisdiction of the ECJ²⁹. Since Lisbon it does and has already been referred to in the case *Sayn-Wittgenstein*³⁰. In this case Mrs. Sayn-Wittgenstein, an Austrian national residing in Germany, acquired the noble title "Fürstin" after adoption. The Austrian authorities changed her surname though as the law on the abolition of the nobility prohibited such titles³¹. The Austrian Federal Administrative Court then referred the question on whether Article 21 TFEU precluded legislation on the recognition of surnames in one Member State, in so far as it contained titles impermissible under the constitutional law of the other Member State³². The Court noted that the Union is to respect the national identity of its Member States, which includes the status of the State as Republic³³. But also before Lisbon the protection of national identities was seen by the Court as a possible ground for justification concerning a limitation on certain fundamental freedoms, which can i.e. be seen in the case *Commission v Luxembourg*³⁴.

It can therefore be said that Article 4 (2) TEU displays the federal structure of the European Union and its Member States which cannot be interpreted as being hierarchical as both sides are to a certain degree dependent on each other to achieve their goals. On the side of the Union this dependence rests on the fact that it needs the Member States to enforce and implement Union law and on the side of the Member States this dependence can be seen in the need for national interests to be reached at Union level³⁵.

It can also be said that Article 4 (2) TEU represents a turning point in the development of the European Union. Whereas sovereignty was taken away from the Member States in the past, it is now ascertained to them as the Member States are seen as the foundation of the Union. Instead of creating a European Identity overriding the constitutional core of the Member

²⁸ Vorndran, *Art. 4 und 5 EUV n. F. – Zum Schutz der Kompetenzabgrenzung- und ausübung*, p. 2.

²⁹ A. von Bogdandy and S. Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", *Common Market Law Review* 48 (2011), p. 1422.

³⁰ Case C-208/09 *Sayn-Wittgenstein* [2010]

³¹ Case C-208/09 *Sayn-Wittgenstein*, para. 3.

³² Ibid, 35.

³³ Ibid, 92.

³⁴ Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207

³⁵ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1425.

States, their national identities are now respected³⁶. This makes Article 4 (2) TEU represent the notion of pluralism which can also be found in the motto of the European Union “United in diversity”³⁷. The fundamental constitutional settings vary considerably throughout Europe as we find republics, such as in Germany and constitutional monarchies, such as in the Netherlands or the United Kingdom; we also find parliamentary and semi-presidential systems³⁸. Article 4(2) TEU stresses the equality between all Member States and can therefore not only be referred to as identity clause, but also equality clause³⁹.

This section shows that the idea of protecting national identities is basically as old as the European Union itself. But the meaning and also the scope of this protection have considerably changed over time. The following section explores the actual meaning of national identity and in what sense it is used in Article 4 (2) TEU.

4. *The Concept of National Identity*

National Identity is first and foremost a particular form of identity, whereas identity can be defined as positioning the *self* opposed to the *others*⁴⁰. As national identity is composed of ethnical, cultural, territorial, economical and legal-political elements, it can be argued that national identity is the positioning of the *national self* opposed to *foreign*⁴¹. For this reason the crucial features of national identity are a common territory, common myths and memories, a common economy and public culture as well as legal rights and duties for each member⁴².

Nevertheless, ambiguity exists as regards the notion of national identity, whereas it can be said that its scope is more limited than the traditional concept of State sovereignty⁴³. If we now look at the notion of national identity as used in the Treaty on the European Union attention is first of all drawn to the fact that Article 4(2) refers to national identities in the plural, which can be interpreted as recognizing that a Member State might have a multinational identity or the plural represents plurality within the Union⁴⁴.

If the text of Article 4(2) TEU is compared to its predecessors the link made to the “fundamental structures, political and constitutional” draws a clear line separating the notion of national identity from elements such as culture, language or history⁴⁵. So even though the origin of the term national identity is of a considerably wider scope, it is used in the Treaty as only to encompass those elements which are enshrined in the constitutions of the Member States⁴⁶.

It has been argued that this limitation in scope is necessary as otherwise any question of EU law could be linked to the national identity of a Member State which would lead to the Union operating less efficiently⁴⁷. Nevertheless what falls within the ambit of national identity of one Member State does not necessarily need to be part of the constitutional foundations of

³⁶ Besselink, *National Identity before and after Lisbon*, p. 41.

³⁷ See <http://europa.eu/abc/symbols/motto/index_en.htm> (last visited 1. Dec. 2011)

³⁸ A. Heringa and P. Kiiver, *Constitutions Compared*, (Intersentia, 2009), p. 57-67.

³⁹ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1426.

⁴⁰ S. Spießberger and M. Ungersböck, „National Identity“ International Marketing Seminar 2005, p. 2.

⁴¹ A. Smith, *National Identity*, (University of Nevada Press, 1991) p. 8-15.

⁴² Ibid, 14.

⁴³ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1426.

⁴⁴ Besselink, *National Identity before and after Lisbon*, p. 42.

⁴⁵ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1427.

⁴⁶ Ibid, p. 1430.

⁴⁷ Ibid, p. 1431.

another⁴⁸. The French Constitutional Council stated in 2006 that it could not allow a directive violating the French national identity unless the *pouvoir constituant* would approve it⁴⁹. In case law certain fundamental principles such as the rule of law, the principle of democracy or the principle of federalism have been accepted⁵⁰. Another example is the Czech Constitutional Court which sees the protection of national minorities and ethnic groups as being part of their constitutional heritage⁵¹.

As mentioned before the German Federal Constitutional Court gave in its Lisbon judgment a very elaborate definition of the German national identity⁵². Reference was made to Article 79 (3) of the German Constitution to define the country's national identity, which encompasses a prohibition to change elements that could affect democracy, the rule of law, the welfare State, the federal structure of Germany and the protection of human dignity⁵³.

This section shows that there is a difference between the actual concept of national identity as applied in literature or philosophy and the meaning of it as used in the Treaties. Furthermore an exact definition cannot be given, as each Member State perceives its constitutional foundations to be attached to different values, whereas it needs to be said that certain core concepts are to be found in every Member State.

5. Legal Effects of Article 4 (2) TEU

As can be understood from the aforementioned section the legal protection awarded to national identities is not absolute in nature. Article 4 (2) TEU should more be regarded as an exception granted to the Member States in cases they fear a severe encroachment upon their fundamental rights. It can therefore be seen more as another test of proportionality that puts the Member States in a position where they have a measure at their disposal to prevent disproportionate interference by the Union⁵⁴. This balancing of interests can also be seen in the case *Sayn-Wittgenstein* where the Court held that a national measure, namely the abolition of nobility in Austria, had to be taken into consideration to balance the right of free movement of persons in the European Union⁵⁵.

Article 4 (2) TEU therefore has the effect of requiring the Union to leave sufficient room to the Member States concerning the implementation of certain community measures such as directives or it might have to consider exceptional opt-out possibilities for Member States whose national identity is affected⁵⁶. Taken a step further it can be argued that in case no such exception is provided for Article 4 (2) TEU offers the possibility to justify non-compliance with an EU measure and by doing so a Member State could effectively limit the primacy of Union law⁵⁷.

Though it has not yet been recognized by the ECJ that Article 4 (2) TEU had such a function as to limit the principle of primacy it did recognize in the *Michaniki*⁵⁸ case that the law of the

⁴⁸ Case C 36/02, *Omega*, [2004] ECR I-9609, paras. 37.

⁴⁹ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1435.

⁵⁰ Ibid, p. 1436.

⁵¹ Ibid, p. 1437.

⁵² Decision of the German Federal Constitutional Court: *Lisbon* (BVerGE) 2009, (English translation: <http://www.bverfg.de/en/decisions/es20090630_2bve000208en.html>)

⁵³ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1438.

⁵⁴ Ibid, p. 1441.

⁵⁵ Case C-208/09 *Sayn-Wittgenstein*, para. 84.

⁵⁶ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1443.

⁵⁷ Ibid, 1444.

⁵⁸ Case C-213/07, *Michaniki*, [2007]

Member States cannot easily be overlooked and thereby gave Article 4 (2) TEU a certain normative weight⁵⁹. But the question about who is the ultimate arbiter, and therefore deciding on what exactly constitutes national identity, remains open. The ECJ does not have the power to do so, as it would require interpreting national constitutional law. This would not be compatible with Article 19 TEU. For this reason it could be argued that it is the exercise of the Member States to establish the scope of national identity and left to the Court to examine the meaning of the disputed Union law⁶⁰.

It can be argued that there are procedures since the introduction of the Treaty of Lisbon with which it is tried to fulfill the promise made in Article 4 (2) TEU. First of all a Member State is now able to withdraw from the Union in case it regards its national identity infringed in an intolerable manner and secondly there is the emergency break procedure, which also presents a possibility to have a State's interest protected⁶¹. Nevertheless it can be said that the willingness of the Member States to limit their sovereign power is not always as present as the Union might infer in order to be effective in their work⁶².

It can be observed from this section that Article 4 (2) TEU is a measure which can be used by the Member States to protect their national constitutional identities. And even though it has not yet explicitly been acknowledged by the ECJ that Article 4 (2) TEU would have the power as to limit EU primacy, it must be admitted that it does limit the powers of the Union as such. And it can also be thought of Article 4 (2) TEU as constituting a way to scrutinize the democratic aspect of the Union⁶³. But as this provision is a recent development a clear and definite answer as to how powerful it really is in limiting EU sovereignty is left to be seen.

6. Conclusion

In context of the history and development of the European Union Article 4 (2) TEU can be seen as a necessary expression of how integration is perceived. Member States are no longer willing to watch inactively how the Union gains more and more power. Even though they willingly grant powers to the Union, they also want to make sure to be part of the legislative development. Article 4 (2) TEU makes it possible for the Member States to prevent an intrusion upon what constitutes their national identities. An exact definition of this identity cannot be provided, as each Member State might regard other elements as fundamental. It is however certain that national identity only encompasses those fundamental elements found in a constitution, so protection is limited in scope as i.e. the protection of cultural or historical aspects might not receive any consideration. But overall a quite similar understanding of national constitutional identity is to be found among the Member States.

To conclude it can be said that Article 4 (2) TEU does not grant unlimited discretion to the Member States, but even though it will ultimately be the ECJ to decide on the effect of Article 4 (2) TEU, it will not have the competence to establish the content of a Member States' national identity. Furthermore this identity clause recognizes a pluralistic conception that exists between Union law on the one hand and the national constitutional law on the other hand. It recognizes that a certain degree of acceptance and trust is necessary in the European Union, but that certain values must not be shared. We find the motto of the European Union "United in diversity" confirmed through the protection given to national identities. So the

⁵⁹ Bogdandy and Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, p. 1444.

⁶⁰ Besselink, *National Identity before and after Lisbon*, p. 45.

⁶¹ Aronstein, *The Union shall respect cultural diversity and national identities" Lisbon's concessions to Euroscepticism – true promises or a booby-trap?*, p. 106, 107.

⁶² Ibid, 109.

⁶³ Chalmers, *European Union Public Law*, p. 221.

question on whether Article 4 (2) TEU constitutes a possible way to limit EU supremacy can in the author's opinion be answered in the affirmative, even though it is difficult to determine how far this limiting power goes at this point in time.

REFERENDA: THE WAY TO A MORE DEMOCRATIC EUROPEAN UNION?

Albane Flamant

1. Introduction

During its short history, the European Union (EU) has often had to face criticism for its democratic deficit. In some occasions and especially after the 1992 Maastricht Treaty, governments of member states have sought the support of their population through referenda when faced with important EU reforms or even the question of their country's accession to the European Union. The results of these votes were not always favourable to the Union. The most striking example of this trend was the 2005 rejection of the Constitutional Treaty by the populations of two founding EU member states, France and the Netherlands. Interestingly enough, some members of the Laeken drafting convention originally wanted this Treaty to be approved by a Europe-wide referendum.¹ This approach was however deemed to be too federal and it was decided that the decision to hold a referendum should be left to the Member States.² As a result, several countries such as Spain, the UK, France and the Netherlands decided to hold a referendum, while the others stuck with the traditional ratification process through parliamentary approval. After positive results in the first few countries, the dismissal of the Treaty by two founding members of the EU came as a shock and had a great impact on the subsequent development of the Union.

In the midst of an economic and identity crisis because of which the legitimacy of the EU is more questioned than ever, this paper will attempt to assess the validity of the use of referenda for the ratification process of something as complex as an European Union Treaty. In the first part of this paper, we will expose the arguments of supporters and proponents of plebiscite, and compare it to statistics and polls completed during the Irish, French and Dutch referenda when relevant. The author will then discuss the impact of these referenda on the development of the Union while arguing for the lack of real value of public vote in the ratification process of a European Union Treaty. We will then examine the prospects for democracy within the Union.

2. Main Body

First we will look at the arguments put forward by both sides in the academic debate discussing the value of referendum for democracy.

2.1 How Informed are They Really?

One of the core arguments of referenda supporters is that this tool provides for an incentive for government and other political actors to channel more quality information to the public on the issue.³ This trend usually goes along with an increase in the demand of information from the public⁴. Different studies and Eurobarometer data from 1992 to 1997 show that people are

¹ Witman, 'No and After: Options for Europe', 81 *International Affairs* 4 (2005), p. 676.

² Ibid.

³ Benz & Stutzer, 'Are Voters Better Informed When They Have a Larger Say in Politics', *Public Choice* 119 (2005), p. 32-33.

⁴ Ibid.

indeed better informed on the EU in countries in which referenda are held.⁵ In the general context of referenda, another study led by Mendelson and Culter supported this conclusion, stating that the knowledge gap between the previously well and poorly informed was indeed reduced.⁶ However, they underlined the fact that this change was actually very modest. An additional consideration in the first study mentioned was that the EUBarometer questions assessing EU knowledge were not ideal since they did not address specific treaty knowledge.⁷ Moreover one might wonder whether the level of information of the voters, even if it is increased prior to the referendum itself, is sufficient for them to make an informed decision: After the Constitutional Treaty referendum, 34 percent of the French ‘No’ voters stated they had troubles understanding what the Treaty was meant to achieve⁸. This was a recurring phenomenon in the 2009 Irish referendum.⁹ The problem here is not the intellectual capacity of voters but rather the fact that being well informed on such a complex topic demands time and dedication. Interestingly enough, studies found that the 2009 ‘Yes’ voters were as uninformed as their ‘No’ counterparts¹⁰. This phenomenon is thus widespread, no matter the direction of the vote.

A possible counter-argument to this insufficient level of information of voters would be that in the case of the Constitutional Treaty, the EU had not planned for any communication budget. Nonetheless, the drafting process of this treaty had been more democratic and open to public than ever before in EU history: the proceedings were not held behind closed doors, the usual Council ministers were replaced by European and National representatives, and all the resulting documents and minutes were made available online.¹¹ Yet voters were faced with a treaty of 450 articles, in addition to over 300 pages of protocol¹². How likely was it that a majority of voters were going to take the time to read it article after article? Even if they did, how many of them had the knowledge and formation required to thoroughly understand its implications in terms of democracy or economy? It is an accepted fact that many citizens do not have a very thorough understanding of the workings of the European Union¹³. In this mindset, the population had to rely on the media, which tended to pick what they thought to be the most interesting issues and to explain them within the domestic political frame.¹⁴ Each of these channels shaped the debate according to their political leaning and sphere of lobbying. Also, the media debate was actually heavily influenced by politicians and other relevant actors from neighbouring countries, who took a great interest in what was happening in France and the Netherlands.¹⁵

Another argument advanced by the pro-side is that because referenda are public votes based on an issue, not a person, they are less personal and thus involve more substantial discussions¹⁶. However, we have seen that in the 2005 referenda, interest groups such as feminists or extreme political parties picked either side of the issue and indeed made it very personal. The stances taken by these interest groups in favour of one side or the other did not at all reflect the consequences of the vote they advocated. For example, many of the ‘No’

⁵ Benz & Stutzer, *Public Choice* 119 (2005), p. 31.

⁶ Culter and Mendelson, ‘The Effects of Referenda on Democratic Citizens: Information, Politicization, Efficacy and Tolerance’, *British Journal of Political Science* 30 (2000), p. 686-693.

⁷ Benz & Stutzer, *Public Choice* 119 (2005), p. 35.

⁸ Cerutti, ‘Europe’s Deep Crisis’, 13 *European Review* 4 (2005), p. 531.

⁹ Abaquesne de Parfouru, ‘See No Evil, Hear No Evil, Speak No Evil: the Irish Referendum and Ratification of the Lisbon Treaty’, 15 *Maastricht Journal of European and Comparative Law* 4 (2008), p. 498 & 508.

¹⁰ Abaquesne de Parfouru, 15 *Maastricht Journal of European and Comparative Law* 4 (2008), p. 507-509.

¹¹ Hughes, ‘EU in Crisis: People’s Revolt’, 40 *Economic and Political Weekly* 24 (2005), p. 2386.

¹² Bull, ‘The Constitutional Development of the European Union’, 83 *North Dakota Review* 1 (2007), p. 22-23.

¹³ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 442.

¹⁴ Vettters et al, ‘Whose Project is it? Media debates on the Ratification of the EU Constitutional Treaty’, 16 *Journal of European Public Policy* 3 (2009), p. 416-417.

¹⁵ Vettters et al., 16 *Journal of European Public Policy* 3 (2009), p. 418.

¹⁶ Benz & Stutzer, *Public Choice* 119 (2005), p. 34.

campaigns were centred on a protest for more democracy within the Union.¹⁷ Yet this was precisely one of the goals of the Constitutional Treaty, which was to be achieved through a greater involvement of national parliaments, new voting procedures and the introduction of the citizen's initiative.¹⁸ This is also one more example of the relative ignorance of the voters leading up to the Constitutional Treaty referendum.

2.2 Democratic Deficit and the Voters' Perception of the Union

Still, the core argument of referendum advocates lays in the democratic deficit of the European Union. Critics argue that the only way to take care of the lack of citizen involvement within the Union is to practice a more direct democracy through the use of referenda. It is additionally argued with reason that the least citizens are involved in the functioning of their government, the more they will not approve the policies and decisions of this same government.¹⁹ If nothing is done to decrease the democratic deficit of the EU, this will further undermine the legitimacy of the Union, which is already questioned to a large extent in the context of the current economic crisis. However, as mentioned before in this paper, reducing the EU democratic deficit was precisely one of the main purposes of the Constitutional Treaty and this issue was consequently dealt with on many levels: generalization of the ordinary legislative procedure, introduction of national parliaments within the legislative process, creation of the citizen's initiative, etc.²⁰

In addition, plebiscites are often no more than a second-order vote that the population uses to convey its opinion of the incumbent government or of another more general issue.²¹ Once again, the French and Dutch referenda provide plenty of examples of national voters who decided on their vote based on things that had nothing to do with Treaty measures: their discontent with French President Jacques Chirac, their fear of the mythical Polish Plumber, their anti-Euro views, etc.²² In the case of France, the example of the Polish Plumber is telling: a study reveals that opening up to Poland had actually benefited France between 1994 and 2004.²³ Actually, at the time of the referendum, which was a year after the EU eastward enlargement, only 200 Polish plumbers worked on the French territory, and the plumbing industry was missing over 6,000 qualified plumbers to answer the French demand.²⁴

Referenda are denatured by interest groups who shape the issue to make it fit their agenda and obtain popular support, and as such do not represent the popular opinion as well as populist views suggest it. The fact that over 80 percent of the French 'No' voters were polled to ultimately be in support of their country's membership to the European Union supports this view.²⁵ Another possible interpretation of this disparity would be to say that while voters were supportive of France's involvement in the European Union, they wanted the EU to go in a different direction. However, given the main concerns of the French 'No' voters were the disapproval of their president and unemployment,²⁶ it is difficult to see how to change the

¹⁷ Abaquesne de Parfouru, 15 *Maastricht Journal of European and Comparative Law* 4 (2008), p. 500.

¹⁸ Hughes, 40 *Economic and Political Weekly* 24 (2005), p. 2386.

¹⁹ Benz & Stutzer, *Public Choice* 119 (2005), p. 31.

²⁰ Serger, 'From Referendum Euphoria to Referendum Phobia- Framing the Ratification Question', 10 *European Journal of Law Reform* 4 (2008), p. 500.

²¹ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 442.

²² Stefanova, 'The No Vote in the French and Dutch Referenda on the EU Constitution: A Spillover of Consequences for the Wider Europe', 39 *PS: Political Sciences & Politics* 2 (2006), p. 252.

²³ Larhant, 'The EU Institutional Crisis', *Notre Europe* (2005)

²⁴ Ibid.

²⁵ Milner, 'Yes to the Europe I Want. No to this One. Some Reflections on France's Rejection of the EU Constitution', 39 *PS: Political Science & Politics* 2 (2006), p. 257.

²⁶ Cerutti, 13 *European Review* 4 (2005), p. 531.

Union based on these two issues. The first one is clearly domestic, even in the event the French meant to question Chirac's decisions in terms of EU policies (they could elect a pro-EU president for the next term), while the second one is a matter of economic policy. The recent expansion of the EU to its ten newest members may have played a role here, but again, this had nothing to do with the question that was asked in the referendum. The results of the Dutch referenda were even more surprising: According to Eurobarometers, the population of the Netherlands had been known to be the most fervent supporter of European integration among all founding members all the way since the 1970s.²⁷ A similar trend could be observed during the 2009 Irish referendum, in which the EU was estimated to be supported by 89 percent of all voters.²⁸ Yet these three countries were supporters of the EU but rejected its treaties.

Another interesting parallel to draw is the difference between the approval rates of French and Dutch governments compared to the ones in Spain, a country in which the Constitutional Treaty was easily accepted through a referendum shortly before the French and Dutch fiasco. While the French President Jacques Chirac was in a very controversial position (40 percent of the 'No' French voters stated they wanted to give him a lesson through their vote), the Spanish Zapatero government was in its first months of tenure and was still very well perceived by the Spaniards.²⁹ While it would be very simplistic to state that the rejection of the Treaty was solely the result of a non-confidence vote geared towards the governments of France and the Netherlands, it is still a factor that should be taken into consideration in the evaluation of these referenda.

2.3 Less Democracy and No Solutions

Referenda provide for some other unwanted side effects. For example, the opinion reflected by the referendum will only tell the majority's point of view. There will no representation of the many small minority groups existing within the country in which the referendum is held, which leads to the disenfranchisement of part of the population.³⁰ It would consequently be very hard to provide fair protections to these minorities if the use of referenda was generalized.

Additionally, referenda give a black or white answer that does not provide much direction for the European Union, especially if it is negative. In the case of the Constitutional Treaty, EU officials did not know what to do and the treaty's rejection was followed by a two-year period of stagnation in the EU decision-making.³¹ Disturbed by the contradicting messages sent by the negative Dutch and French Referenda, the European Council failed to approve the 2007-2013 budget.³² The impact of this rejection was significant, but left the Union clueless on the direction to follow next. In the later process of the drafting of the Lisbon treaty, the members of the Convention demonstrated their unease when some Member States stated their intention to hold referenda to ratify the document.³³ In the end, all of them went along with ratification through parliamentary procedure, except Ireland, in which a referendum was constitutionally required.³⁴

²⁷ Aarts and Van der Kolk, 'Understanding the Dutch No: The Euro, the East and the Elite', 39 *PS: Political Sciences & Politics* 2 (2006), p. 243.

²⁸ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 512.

²⁹ Cerutti, 13 *European Review* 4 (2005), p. 531.

³⁰ Baohang He, 'Referenda as a Solution to National Identity/Boundary Question: an Empirical Critique of Theoretical Literature', 27 *Alternatives Global, Local and Political* 1 (2002), p. 67.

³¹ Benz, 'European Union's Trap of Constitutional Politics: From the Convention Towards the Failure of the Treaty of Lisbon', 17 *Constitutional Forum* 1 (2011), p. 1.

³² Cohen-Tanugi, 'The End of Europe', 84 *Foreign Affairs* 6 (2005), p. 55.

³³ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 437.

³⁴ Ibid.

More importantly, there was a substantial change in the drafting process of the Lisbon Treaty itself. While the Laeken convention was unusually composed of national and European parliamentary representatives, the governmental ministers were back for Lisbon. The national parliaments still had a veto power on the Lisbon amendments, but their involvement was much more remote. Overall, this was a step back in the fight against the EU democratic deficit.

Another side effect is how these referenda affect the voting dynamics of the European Union. The fact that referenda are only held in certain Member States skews the democratic process by giving more influence to these states in the negotiations.³⁵ One could even argue that this situation is a serious breach of treaty law: If we look at Art. 2 & 3 TEU, along with Art. 18 TFEU, the two treaties expressly prohibit discrimination on the basis of liability. Even though it is understandable that states would want to make the decision of having a referendum or not, this may be considered discrimination on the base of nationality, and in itself a very undemocratic process. If the Union was to continue to allow the use of referenda, it should allow the whole EU population to give their opinion, or stick with the previous procedure of ratification by government representatives with the assent of their national parliament.

Where does this leave us in regards of democracy within the Union? While the EU has been largely criticized for its democratic deficit, in some ways it is modelled after its Member States, which are all using a government system based on representative democracy. European parliamentary representatives are directly elected to form an institution that is increasingly involved in the day-to-day functioning of the Union. In the same fashion, the Council of Ministers and the European Council are composed of members indirectly elected to serve in this position. The only European institution falling outside of that scope is the Commission, whose members are nonetheless elected through a process involving the European Parliament. In the case of the three first institutions, the fact that their representatives are directly elected through a set of national elections has given them a mandate that legitimizes their decisions.³⁶

In many ways, one could argue that EU citizens almost have as much influence on the EU institutions that on their own national ones: as mentioned above, whether directly or indirectly, they have a say in the composition of most of the institutions of the EU, with the Commission that could be seen as equivalent to a Chancellor appointed by his directly elected peers (the European Parliament and the Council)³⁷. They also have influence on the Union through their domestic politics: the elections of their national leaders may be influenced by European Union affairs, since for example their support of an unpopular country's adhesion to the Union could sway the next national elections in the favour of their opponent.³⁸

The problem however is that these national representatives tend not to take European issues to their electorate.³⁹ This phenomenon can be observed on many levels: The European Parliament elections, for example, are currently playing a very secondary role in the mind of EU citizens,⁴⁰ and national parties just do not tend to have a European Agenda to present to their voters. All of this contributes to the overall perception of the EU as a less important issue for the public. On the European level, there has already been a small effort, with the statement in the Treaty on the European Union that EU political parties should contribute to forming political awareness and expressing the will of the Union (Art. 10 TEU). For this purpose, they have been provided with funding through Art. 224 TFEU. This effort should be

³⁵ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 442.

³⁶ Serger, 10 *European Journal of Law Reform* 4 (2008), p. 442.

³⁷ N. Moussi, *Access to European Union Law, Economics, Policies* (European Study Service, 2008)

³⁸ Ibid.

³⁹ Taggart, 'Questions of Europe- The Domestic Politics of the 2005 French and Dutch Referenda and their Challenge for the Study of European Integration', *Journal of Common Market Studies* 1 (2006), p. 12.

⁴⁰ Aarts and Van der Kolk, 39 *PS: Political Sciences & Politics* 2 (2006), p. 245.

extended to the national level so that the elections of the European Parliament will not be seen as second order ones.

According to Bowler, 'the main problem is that people do not trust the elected officials and thus feel the need to be more involved in governance despite the lack of a substantive base of factual information as well as a potentially low desire of being involved in policy-making.'⁴¹ In this mindset, there needs to be a trade-off between direct and representative democracy. Representatives have incentives to become knowledgeable on the issue they are responsible for, while voters usually lack the knowledge to understand deeper policies issues.⁴² While the representative's opinion does not always represent the voice of its constituency, it is preferable that he is the one making the decision, especially on issues on which citizens do feel strongly about.⁴³ It is true that referenda are the only way to directly ascertain the popular will, but it should only be used in specific situations. Issues presented for the approval of citizens should be simple and straight-forward as to the consequences of the vote going one way or the other. They may be best used on questions of culture or morals, such as abortion or the death penalty, or on another level, on the accession to an international organization such as the European Union. Such referenda may assess the overall perception of the public on the issue, and thus help guide the legislator on how to best represent the popular will while taking into account the everyday reality of governance. But more importantly, an effort should be made in terms of communicating with the representatives, and holding them accountable. A possible way to achieve this goal is for the citizens to be more involved as active members of their political parties.

3. Conclusion

The examples drawn from the experience of the Constitutional Treaty referenda were used to demonstrate their inadequacy for general treaty ratification. Some of the reasons for this inadequacy include the difficulty for voters to be sufficiently informed, the lack of connection between the questions voters are answering through their vote and the question asked by the referendum and the fact that referenda fail to provide a course of action, especially when answered negatively.

This situation may be compared to a patient who could decide if the treatment proposed by his doctor is appropriate to cure his disease. In this situation, people would generally not be offended if they were told they do not have the necessary knowledge and formation to make that call. There might be some decisions that the doctor will submit to the approval of the patient, but they will rather be linked to the way the patient wants to live than to the technicalities of the treatment. The issue will be more philosophical than practical. An example would be a patient refusing to undergo chemotherapy because he feels that it is not compatible with his lifestyle.

This does not mean that the opinion of the public does not matter, on the contrary. An engaged public provide for a better quality of representation because of the increased level of accountability demanded, as well as the usually more selective election process. In the same way EU citizens may decide on electing new leaders for their country or for the European Parliament if they are unhappy with the direction taken by the Union, the patient may decide to go to another doctor. In addition to elections, citizens may influence the day-to-day EU life in many other ways: a great example is the European citizen's initiative, which is a great

⁴¹ Bowler and al., 'Enraged or Engaged? References for Direct Citizen Participation in Affluent Democracies', 60 *Political Research Quarterly* 3 (2007), p. 353.

⁴² Kessler, 'Representative Versus Direct Democracy: the Role of Informational Assymetrics', 112 *Public Choice* 1/2 (2005), p. 10.

⁴³ Ibid.

opportunity for motivated citizens to provide for legislative ideas. Given that the regulation putting this initiative into place only allows for the first one to be launched in April 2012, we have currently no experience of its practical shortcomings. Its procedure might have to be adjusted to make sure that the citizen's voice will be heard by the Commission, for example by putting into place a right of appeal to the ECJ for the initiators if the Commission rejects their proposal.

In this mindset, it is necessary for the Union to find ways to interest its citizens to the EU project, since it is in many ways impacting their lives as much as their national government. However this is a challenge faced at both the European and domestic levels: It is difficult to get people involved in the democratic process, no matter where you are. The best account for this phenomenon is the low rate of participation of voters in countries in which voting is not mandatory. Nonetheless, the EU should double its efforts to get people to be more knowledgeable about the functioning of the EU in general, as well as to get them to demand a more specific European agenda from their national parties. One of the goals here is to make people realize that European elections are in no way of secondary order: decisions taken on EU level affect the way we travel, the way we work, the way we eat, the way we study, etc. Citizens currently have so many possibilities to influence the course of EU decision-making. In addition to all the ones that have been mentioned, they also have the right to challenge, directly or indirectly through their national parliaments, relevant EU legislation or even acts of the Commission. What they need is to be more aware of these possibilities, as well of the influence of the EU on their everyday life. For that purpose, there should be even more information and transparency.

In many ways, the EU representative system set out by the Lisbon Treaty provides for much more democratic safeguards than referenda, in which emotions run as high as during a football match: the voters will rather side with the loudest fans than base their choice on a rational evaluation of the situation. As a result of the use of referenda, the opinion of several minority groups are left out, and the discriminatory way they have been used in 2005 and 2009 has led to a skewing of the balance of voting powers in between member states. While a more engaged European citizenship is something we should thrive for within the European Union, referenda are just not the appropriate tool to achieve that goal.

DIRECT DEMOCRACY WITHOUT A EUROPEAN IDENTITY: AN OBSTACLE TO INTEGRATION?

Chiari Larghi

1. Introduction

The failure of the Constitutional Treaty, which will be further examined below, is here taken as an example in order to explain why democracy appears to be an unsuitable mean to ratify the European Treaties. The paper will try to do so by analysing the more immediate and practical reasons (i.e., lack of knowledge or lack of interest in the Union's affairs) which will be then reconnected to deeper causes, such as the citizens' attachment to their own national identities and the consequent inexistence of a common European identity.

With the peoples so strongly related to their national collective consciences (as intended in the light of Durkheim's theory), the European experience can only remain an intergovernmental one, in which the political elites and the heads of state will keep negotiating and reaching agreements way too far from the citizens to even think that national referenda could be successful.

The argument is that Europe is not ready for direct democracy and it might never be mature enough: the more time passes and the more its complexity grows, making it unthinkable that common citizens with few and limited information could be competent active participants of the ratification process.

2. The History of the Failure

In one of the declarations attached to the Treaty of Nice (2000), namely Declaration 23 on the Future of the Union, it was called for a 'deeper and wider debate about the future of the European Union', recognizing 'the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States' and encouraging 'wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc'.¹

Subsequently, in 2000, the German Foreign Minister, Joschka Fischer, gave a speech during which he launched a public political debate about the possibility of having a Constitution for Europe, showing that the political elite was ready to take a step towards the citizens.²

Upon the desire to bring the Union closer to the people (as expressed in the mentioned Declaration 23), the Member States met at the Convention on the Future of Europe which opened in Brussels in February 2002 and began working at what, one year later, was called the Draft Constitutional Treaty. The draft was then presented to the Intergovernmental Conference (ICG) in October 2003 where the Members agreed that they had time until October 2004 to complete the ratification process: on that date the Constitutional Treaty was signed by all the States.³ However, it never entered into force.

¹ Declaration 23 to the Treaty of Nice on the Future of the Union, final act available on <http://www.eurotreaties.com/nicefinalact.pdf> (last visited on: 5 November 2011).

² G. de Búrca, *The EU Constitution: in Search of Europe's International Identity*, (Europa Law Publishing, 2005), p.4.

³ D. Chalmers, *European Union Public Law*, (Cambridge, 2007), p. 37.

3. *The Immediate Causes of the Failure*

Article 447 of the Draft established that the Constitution had to be ratified by all Member States according to their own national constitutional requirements, hence each State had a veto power on its entrance into force.⁴

After October 2004, the Constitutional Treaty was ratified by parliamentary approval in Lithuania, Hungary, Slovenia, Italy, Greece, Slovakia, Bulgaria, Romania, Austria, Germany, Latvia, Cyprus, Malta, Belgium, and in Spain and Luxemburg via referenda.⁵ Regardless of these Member States' support, in the end, the Constitution never became effective because vetoed by the popular referendums held in France and in the Netherlands.

On May 29, 2005, 55% of the citizens of France voted against the Constitutional Treaty, and so did the 61,6% of the Dutch on June 1, 2005, arresting like this the integration process for a 'period of reflection'.⁶ Other referendums were, in fact, scheduled for Czech Republic, Denmark, Ireland, Poland, Portugal, and the UK, but these were all postponed after the French and Dutch negative outcomes.⁷

Numerous studies and public surveys were conducted after the rejection in order to understand the reasons behind their 'Nay', and interestingly enough, it was found that many voted against it for the all kinds of reason but the Constitutional document in itself.

In France, the opponents revealed that while casting their votes they were indirectly expressing their concerns about their domestic socio-economical issues, their general discontent with their own political class, and also their fear about the eastern enlargement, in particularly the possible entry in the Union of Turkey and the eventual availability of the cheap-labour of the east.⁸ To take a closer look at the data, 31% of the people that voted said 'no' because they were scared of the estimated negative effects on their own economy (increases of unemployment and relocation of business), 18% rejected it as a way to prove his opposition to Jacques Chirac (the French President at the time), 6% did it to show their disapproval of a possible Turkish admission, and 3% disagreed with eastern enlargement in general.⁹

In the Netherlands the situation was not much different: 32% of the opponents declared they lacked sufficient information about the constitutional text, 19% feared the loss of national sovereignty, 14% was opposing their national government and politics, and 7% stated that the Constitution would facilitate eastern enlargement, leading to a relocation and a loss of jobs.¹⁰

As these numbers show us, in both countries when the people went to vote, they let their domestic political and economic concerns have the precedence over the Draft Treaty they were voting on. Many of those 'No' were not meant to express a rejection of the Constitutional text *per se*, but rather a way to slow down the whole integration process or to highlight their dissatisfactions with their own national politicians. For the Dutch voters the

⁴ Text of Article IV-447 available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0186:0202:EN:PDF> (last visited on: 5 November 2011).

⁵ J. Wouters *et al.*, *European Constitutionalism Beyond Lisbon*, (Intersentia, 2009), p. 19-20 (table 2).

⁶ R. Podolnjak, 'Explaining the Failure of the European Constitution: A constitution-making Perspective', 57 *Collected Papers of Zagreb Law Faculty* (2007), p. 2.

⁷ J. Wouters *et al.*, *European Constitutionalism*, p. 20 (table 2).

⁸ H. Milner, 'Yes to the Europe I Want: NO to This One. Some Reflections on France's Rejection of the EU Constitution', 39 *Political Science and Politics* (2006), p. 257; and B. Stefanova, 'The "No" Vote in the French and Dutch Referenda on the EU Constitution: A spillover of Consequences for the Wider Europe', 39 *Political Science and Politics* (2006), p. 252.

⁹ European Commission 2005 b, *The European Constitution: Post-Referendum France* Eurobarometer 171. (N.B. for all Eurobarometer data see http://ec.europa.eu/public_opinion/index_en.htm).

¹⁰ European Commission 2005B, *The European Constitution: Post-Referendum: Netherlands* Eurobarometer 172.

referendum was merely an opportunity to ask Brussels to pay more attention to Dutch issues¹¹ and to address their concerns about the common currency and the economic consequences that the Euro had on their lives. The general perception was of ‘an institution costing too much and threatening both our jobs and our social securities’.¹²

Lack of information, loss of national sovereignty, opposition to the national governments, expensiveness of Europe, future eastern enlargement, Turkey admission, loss of jobs and business relocation: these all the reasons for the French and the Dutch people to say NO. And yet the referendum was focusing on a complete different topic: should the Draft Constitutional Treaty be ratified, yes or no? The question looked very simple and straightforward, however, it contained ‘a multiplicity of demands and policy dimensions hardly captured by the question itself’¹³ and the domestic political elites clearly ‘failed to address the need for a continued focus on the Constitution itself’, so that finally people forgot about the issue in question (i.e., the Constitutional Draft) and popular referenda proved themselves to be ‘of limited utility as an aggregate measure of the popular will in the EU’.¹⁴

In her study ‘Taking Cues on Europe?’, Hobolt argues that competent voting depends on the information and stimuli provided to the public by the political elites¹⁵ and that the outcome of a referendum like the one that took place in 2005 would be seen as truly democratic only if the people had casted their choice in strict relation to the issue in question, but in fact the data show us that the voters said ‘no’ on the basis of ‘second-order’ factors related to their national concerns.¹⁶

4. *Deeper Causes of the Failure: Attachment to National Identities*

The mere fact that people voted on unrelated or second issues or that they did it aware of lacking the required knowledge is a symptom of a more general lack of interest in the Union’s affairs. As demonstrated by Aarts and van der Kolk, the Dutch newspapers were rarely attentive to European matters, while the public tended to show little interest towards active participation in the Union: the turnout of the EP’s elections in 2004 was 39%, a much lower rate compared to national elections.¹⁷ According to other studies across the EU, 79% of the people interviewed believed they were insufficiently informed, while 62% did not intend to participate in the debate at all, and that the support for democracy at the European level is 20% less than the support for their national democracy.¹⁸

This apparent apathy and, from time to time, even antipathy towards the Union could be reconnected to the sense of threat against national sovereignty and identity perceived among the countries.¹⁹ As Smith claims in his article, individuals ‘are afraid to let go of the old’,²⁰ they are holding tight to their national cultures. From a nationalist perspective, the nation-state is the only ‘legitimate government and political community’,²¹ they may commit their loyalty

¹¹ Milner, 39 *Political Science and Politics* (2006), p. 258.

¹² Aarts and van der Kolk, ‘Understanding the Dutch “No”: The Euro, the East, and the Elite’, 39 *Political Science and Politics* (2006), p. 243.

¹³ G. Tsebelis, *Veto Players*, (New York: Russell Sage Foundation and Princeton NJ: Princeton University Press 2002), p. 117.

¹⁴ Stefanova, 39 *Political Science and Politics* (2006), p. 254.

¹⁵ S. Hobolt, ‘Taking Cues on Europe? Voter Competence and Party Endorsements in Referendums on the European Integration’, 46 *European Journal of Political Research* (2007), p. 177.

¹⁶ S. Hobolt, 46 *European Journal of Political Research* (2007), p. 157.

¹⁷ K. Aarts and H. van der Kolk, 39 *Political Science and Politics* (2006), p. 243.

¹⁸ *Eurobarometer*, CEC 2001c.

¹⁹ D. Dunkerley et al., *Changing Europe- Identities, Nations and Citizens*, (Routledge 2002), p. 119.

²⁰ A. Smith, ‘National Identity and the Idea of European Unity’, 68 *International Affairs* (Royal Institute of International Affairs) (1992), p. 56.

²¹ Ibid.

to: its members speak the same language, share the same memories, traditions, and history, they might even fought wars together for their own country, holding on to ‘shed blood, sweat, and tears’²² of the past. Their common heritage is what distinguish them from the others and before the European Coal and Steel Community was found in 1951, Europe was well known for its history of conflicts between sovereign and independent states.

We were born divided and now it is very difficult for us to fit together. Smith calls it ‘the concept of collective cultural identity’,²³ made of continuity, unity and perseverance. As humans, we love habits, they are comfortable, we tend to be a bit reluctant towards changes and we do not always react well when these changes are rapid and imposed upon us from outside. So even if the new generations might have lost that Romantic concept of nationalism and commitment to their land, it is still quite understandable why the majority of EU citizens believe they do not share a common identity.²⁴

The people declaring a stronger attachment for their national identity are 30% more than the ones declaring some sort of attachment to Europe:²⁵ ‘national pride still runs very high in almost all EU Member States’.²⁶ Therefore, if we consider a constitution as ‘a union of people’²⁷ and if we recognize that the ‘traditional political community’²⁸ is missing, then it will not come to a surprise that the peoples of Europe did not accept the idea of a common Constitution.

As further analysed by Podolnjak, the core of the problem lied in the fact that the Draft proposed was a very complex document, forged by experts and chiefs of state during intergovernmental negotiations and on which citizens should have not voted a simple ‘yes’ or ‘no’, firstly because they did not have the necessary knowledge to formulate a competent and complete opinion on the matter, and secondly because such a simplistic approach was not capable of reflecting the multitude of aspects addressed in the proposed document.²⁹ Instead he proposes a different kind of democracy for the Union: related to Stein’s study, his advice is to submit the EU institutions under a greater control of the national parliaments during the legislative process, i.e. he proposes a more extensive form of representative democracy, especially considering that direct democracy proved to be a dangerous instrument more than a tool for popular wise participation in the Union’s development.³⁰

The second observation advanced by Podolnjak is that maybe we should not force direct democracy to legitimize the European integration process, maybe the whole assumption that it is possible to transfer constitutional principles from a nation-state’s level to the Union’s is a wrong assumption. Perhaps the highly debated ‘democratic deficit’ is meant to persist due to the lack of ‘affinity of mutual understanding between the EU institutions and the citizens’³¹ and we should not worry too much if the Union’s policy turns out completely different from the one envisaged in our countries. So that in the end, the very nature of the Constitution is to be criticized: the Draft Constitution should have been seen as a ‘treaty’ more than as a ‘constitution’, should have been divested of all that empty constitutionalism, should have not been proposed to the people directly and should have been ratified by the national parliaments as any other international treaty.

²² M. Kumm, ‘Why Europeans Will Not Embrace Constitutional Patriotism’, 6 *Oxford Journals* (2008), p. 123.

²³ Smith, 68, *International Affairs (Royal Institute of International Affairs)* (1992), p. 58.

²⁴ Eurobarometer CEC 2000.

²⁵ Eurobarometer CEC 2001b.

²⁶ D. Dunkerley et al., *Changing Europe*, p. 120.

²⁷ Podolnjak, 57 *Collected Papers of Zagreb Law Faculty* (2007), p. 21.

²⁸ Podolnjak, 57 *Collected Papers of Zagreb Law Faculty* (2007), p. 24.

²⁹ Podolnjak, 57 *Collected Papers of Zagreb Law Faculty* (2007), pp. 29 and 27.

³⁰ Podolnjak, 57 *Collected Papers of Zagreb Law Faculty* (2007), p. 29; and Stein, ‘International Integration and Democracy: No Love at First Sight’, 95, *American Journal of International Law*, (2001), p. 524.

³¹ Podolnjak, 57 *Collected Papers of Zagreb Law Faculty* (2007), p. 25.

5. *National Identities and their Nexus with the Law: Durkheim's Theory of Legal Development*

Émile Durkheim (1858-1917) played a crucial role in the modern analysis of the sociology of law. Particularly, he explained how law can hold societies together, preventing its members from taking different directions and communities from falling apart.³²

According to his view, a society is basically a moral system in which law is the explicit manifestation of common morals.³³ The more society develops, the more human relations become complex and diversified. Each one finds his own occupation and each one becomes indispensable to the other so that, in the end, a net of interdependences is created.

We are all necessary for the correct functioning of society, we all have interest in others, and that interest is what keeps us united. In other words, these economic dependences and exchanges are what bind us together in a permanent way.³⁴ The modernization of society accentuated individualism without leading to the disappearance of solidarity: social solidarity and morality are still there and the law is their indicator.³⁵

If we look at this theory from a national perspective, we can see that social communities share ethical principles that are, to a certain extent, common to all its members. National communities recognize their identity inside their morals, their language, their ethical rules and perhaps even religion. They all possess a social solidarity of which the law is the objective and codified form.³⁶

This shared set of beliefs and values is what Durkheim defines as 'collective conscience'.³⁷

From this we can deduce that a nation's legal system is to be interpreted as the expression of the people's morals, and its legitimacy lies in the fact that such moral rules are also the individuals' rules. If you recognize yourself in a community and its law, then it is easier to accept it. But if Europe does not possess a common identity then its citizens do not feel any moral cohesion, hence they will not perceive the purpose of a common constitution.

Actually what happened was the exact opposite: as they faced to possibility of an irreversible constitutionalism for Europe, they closed themselves even strongly behind their national 'collective consciences'. And if people do not identify themselves with the Union as an entity then it is easier to understand why popular enthusiasm was missing.

6. *Incompetent Voter: Direct Democracy Violated?*

The lack of a common European identity explains why the plebiscites failed so badly: direct democracy was misused in those referenda, and as Professor van der Mei pointed out in his article, 'when voters use the constitutional rights for the wrong reasons, I fail to understand what is so democratic about it. In fact, it would rather seem an insult to the notion of representative democracy, which is introduced not just for reasons of efficient decision-making, but also to ensure that the decisions are taken by representatives who know what they are talking about'.³⁸

Precisely in relation to the aspect of incompetent voters, Hobolt published a political research in which she analyses the matter in depth. As she underlined, in 2004, 33% of the European

³² R. Wacks, *Philosophy of Law- A Very Short Introduction*, (Oxford University Press, 2006), p. 76.

³³ J. Sutton, *Law/Society- Origins, Interactions, and Change*, (Pine Forge Press, 2001), p. 32.

³⁴ J. Sutton, *Law/Society*, p. 33.

³⁵ Ibid.

³⁶ J. Sutton, *Law/Society*, p. 34.

³⁷ R. Wacks, *Philosophy of Law*, p. 77.

³⁸ A.P. van der Mei, 'The treaty of Lisbon- Power to the People or Power to the Elite?', (2010) European Law: Foundations, Coursebook (meeting 1), Maastricht University.

public had never heard of the Constitution and more than half of the interviewed was unable to answer correctly about specific questions related to the Draft³⁹. After the referendum, the Dutch voters (one-third) and the Spanish voters (one-quarter) affirmed that they felt not sufficiently informed about the text and, therefore, rejected it.⁴⁰

Even on more general basis, citizens appeared to be better informed about their national governments and politics, whereas they had a much lower knowledge about the whole functioning of the EU and its institutions.⁴¹

We may also focus for a moment on another example of failed referendum, the one which was held on June 12, 2008 in Ireland on the adoption of the Lisbon Treaty.⁴² 53.4% voted against it due to lack of information, but also concerns about some national laws (abortion and neutrality laws) and the hypothetical pan-European army.⁴³ Further studies demonstrated that lack of information played a major role in that case. Gora analyzed the Irish public press between the 6th and the 12th of June 2008, namely *The Evening Herald*, *The Irish Independent*, *The Irish Times*.⁴⁴ She argued that the key to form a competent electorate is to provide the people with neutral and accurate information (provided, of course, that these people read the newspapers on regular basis). With regards to neutrality, she found that 53% of the published statements were explicitly in favour of the adoption of the Lisbon Treaty: this is clearly not impartial enough.⁴⁵ Concerning the correctness of the information, she discovered that 63% of the material related to the Treaty contained unsound or unreliable observations, and, occasionally, even false arguments.⁴⁶

This is shown here simply to prove how the public press may not be sufficient for building the knowledge necessary to the people before voting. Such a knowledge was highly necessary considering the complexity of the text in question. The Constitution had, in fact, a very technical wording, 448 articles with numerous protocols and declarations attached, for a total length of 470 pages on the Official Journal. It comes with no surprise that an average person felt insufficiently prepared to vote soundly and consciously on the document.

7. *The Missing Constitutional Spirit in Europe*

This section will briefly discuss the lack of a deeper notion of constitutionalism throughout the European political system by looking, firstly, at Podolnjak's argument of the missing of a 'constitutional moment' and, secondly, at the lack of a 'constitutional patriotism' as presented by Kumm.

When Podolnjak writes about a constitutional moment he refers to a moment in time (which may be either short or last a few years) that is particularly suitable for the ratification of a constitution.⁴⁷ His argumentation appears quite logical: history teaches us how great constitutions came after revolutionary moments during which people were excited and in need of having a new codified set of laws to insure the restored order. The author mentions Professor Edward McWhinney's work *Constitution-making* in which he elaborates on the

³⁹ *Special Eurobarometer* 214 (2004).

⁴⁰ European Commission 2005a, 2005b.

⁴¹ *Eurobarometer* 39.0 (1993).

⁴² D. Chalmers, *European Union*, p. 49.

⁴³ *Ibid.*

⁴⁴ A. Gora, 'The Irish Lisbon Treaty Referendum: Does Direct Democracy Work for the EU?', Carleton University (2009), text available on: http://carleton-ca.academia.edu/AnnaGora/Papers/171175/The_Irish_Lisbon_Treaty_Referendum_Does_Direct_Democracy_work_for_the_EU (last visited on: 5 November 2011).

⁴⁵ A. Gora, Carleton University, p. 7.

⁴⁶ A. Gora, Carleton University, p. 8.

⁴⁷ Podolnjak, *57 Collected Papers of Zagreb Law Faculty* (2007), p. 6.

matter. According to the Professor, constitutions generally happen right after a period of public euphoria because it is exactly upon such an excitement that the citizens are really willing to accept them.

Usually we speak about the years following social or political crisis, revolutions, or wars of self-determination,⁴⁸ none of which applied to the European situation in 2004, when the Constitutional Treaty was first proposed.

The citizens of Europe did not feel such an impellent urge for a new beginning or for a more secure and legitimate legal order so that, in the end, they approached it completely unenthusiastic.

The argument advanced by Kumm goes even a step further. He analyzed the French and the Dutch negative responses, together with the decreasing turnouts of the EP's elections and the adverse responses collected by the Eurobarometer surveys,⁴⁹ concluding that the missing ingredient was a deep-rooted 'constitutional patriotism'. By considering the universal principles of democracy, human dignity, and rule of law referred in the preamble of the Constitution, he asserts that a constitutional commitment is not just a mere arrangements over an abstract set of commonly accepted values, but it also a deeper connection with the past through which a constitutional agreement serves the purpose of reaching a certain political system in the future.⁵⁰

He further explains that the actual electoral and political system of Europe is organized in a way that prevents rather than promoting the development of a strong European identity.

This is due to the fact that the work of the European Parliament, in his view, does not follow within the topics of public interest and this is because this institution lacks the power of agenda-setting: the general opinion, therefore, is that its function is restricted, that its members are most likely not to change anything with the Union, hence that it will not make much a difference whether a certain representative wins the elections or not.⁵¹ This would also explain why the general turnouts for the European Parliaments elections of 2004 was 45.7% (the lowest ever registered before),⁵² with an overall fall of nice percentage points from the turnouts in 1979 to the ones in 2004.⁵³

These data should not surprise us if we consider that the electorate does not see the purpose of indicating its favourite representative because it cannot perceive the political power of the institution *per se*. The electoral campaigns are incapable of presenting a valid program truly European, especially considering that most of the debates in each country focus on national concerns: there are discussions on the benefits and costs of membership, pros and cons of the deepening of the integration process,⁵⁴ but there is nothing that indicates to the public what type of Europe they should aim to.

Looked from this perspective, the solution would be a better public education which could help the people to develop a thicker European awareness and conscience. This could favour the creation of a more conscious electorate with a deeper common identity willing to move in the same direction.

⁴⁸ E. McWinney, *Constitution-making: Principles, Process, Practice*, (University of Toronto Press 1981), p. 14-19.

⁴⁹ M. Kumm, 6 *Oxford Journals* (2008), pp. 117 and 118.

⁵⁰ M. Kumm, 6 *Oxford Journals* (2008), pp.123 and 124.

⁵¹ M. Kumm, 6 *Oxford Journals* (2008), pp. 129 and 130.

⁵² <http://www.elections2004.eu.int>. (last visited on 5 November 2011).

⁵³ M. Kumm, 6 *Oxford Journals* (2008), p. 128.

⁵⁴ M. Kumm, 6 *Oxford Journals* (2008), p. 131.

8. Conclusion

The paper tried to analyze the function of direct democracy within the European Union electoral system. The starting point was the rejection of the Treaty establishing a Constitution for Europe by the referendums held in France and in The Netherlands in May and June 2004 respectively. Driven by the desire of bringing the Union closer to the people, the direct voting proved itself to be a very dangerous choice which, in the end, materialized the risk of bringing the integration process to a standstill.

Post-referenda surveys demonstrated that in both countries the majority of the ones who rejected the Constitution did it inspired by 'second-order' issues. The referendums asked the citizens whether the document should have been ratified, but many declared they voted 'no' because they meant to show disapproval towards their national governments, towards the eastern enlargement (in particular Turkey's possible admission), towards the expensiveness of the EU, and others because they felt insufficiently informed about the text. This very last motivation is arguably the most alarming one: direct democracy could only function properly if people were capable of casting their votes with the required knowledge of the topic at stake. Equally worrisome is the fact that very few declared they voted against it due to a sincere and conscious disagreement with the content of the text *per se*.

Another interesting reason behind the rejections was the perceived threat to national identities and sovereignty. As explained by Durkheim's theory of social and legal development, each community as its own set of values and principles. Its members are held together by a moral cohesion which is legitimized through their legal system. The law is then a social fact, an external factor which keeps people together in contrast with others. Laws are the formal expression of a people's 'collective conscience', and the citizens of Europe decided to hold on to their own national solidarity afraid that a European constitution would might take it away from them, imposing a remote and extraneous government in Brussels. This also could help us understand why it is still impossible to speak about a European common identity, and why the paper refers to the peoples of Europe rather than to the European people.

Together with the argument that the Constitutional Treaty was proposed in a moment of time not suitable for the creation of a constitution (i.e., a non-constitutional moment) and that the citizens perceive the European Parliament as an institution with too limited powers (it is not the agenda-setter of legislative proposals), it does not come as a surprise that the citizens felt not ready to give their consent to the Constitution.

Moreover, the text of the document was very long and technical, arguably too complicated for the average citizen to be fully understood, also considering the fact that the public press and debates in the media failed to properly inform the public. The Draft Constitution should have intended as a treaty forged via intergovernmental bargaining, hence to be implemented via representative democracy, ratified either by the EP or by the national parliaments.

For all these reasons, direct democracy failed to serve the purpose of giving more opportunity to the people to express their opinion, it rather merely gave them the chance to address their national concerns mixed with a more general apathy towards the Union's political life.

THE NEED FOR AND THE BLESSINGS OF SOFT LAW: HYBRIDITY OF LAW AND NEW GOVERNANCE

Hannah Mangel

1. Introduction

It has been 61 years since Jean Monnet came up with a plan to linking the coal and steel industries of the war giants France and the defeated post World War 2 Germany in order to prevent another war: the Schuman Plan setting up the European Coal and Steel Community. It seems that even 61 years later, Monnet's ideas remain. They are recently being picked up again, incorporating the idea of adherence through dependence and peer review. Today, Monnet-like models of Governance can be witnessed in several EU policy fields, labeled as "Network Governance" and more generally as "New Governance". The idea of such governance is however not that "new" or so it may seem. What is in fact new is the means being used to establish such forms of governance. Today, the merging and inter-action between hard and soft law (*Hybridity*) is being used to establish effective enforcement models in several EU policy domains and enhance, as several authors point out, the effectiveness, legitimacy and transparency of the EU.¹ This raises the question whether soft law may be a useful and beneficial means to achieve such ends. The paper will argue that this is in fact the case. It will to that end give an outline of what soft law is (Part II), explain the inter-relation of hard and soft law in the course of creating new governance models (Part III) and further introduce two current examples in EU law to illustrate the need for soft law in current EU governance (Parts IV and V).

2. What is Soft Law?

The most often quoted definition of soft law has been established in Francis Snyder's influential paper, in which he identifies soft law as 'rules of conduct which in principle have no legally binding force but which nevertheless may have practical effect'.² Soft law is therefore the name given to measures, which do not constitute legislative acts passed by Council and Parliament (hard law). The very purpose of putting a name on this kind of measures, according to Beveridge and Nott is the possibility to identify measures that are not law but nevertheless have some legal implications.³

Soft law began to develop in the European Union in the 1970s.⁴ The sources of EU law are currently listed in Art. 288 TFEU. The article mentions recommendations and opinions as soft law instruments available to the European institutions. It fails to take account, however, of the variety of other soft law mechanisms circulating in the EU law sphere. Other examples are frameworks, resolutions, communications, declarations, guidance notes and inter-institutional

¹ L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?', 9 *Electronic Journal of Comparative Law* 1 (2005), p.1

² F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993), p.16

³ F. Beveridge *et al*, "A Hard Look at Soft Law" in P. Craig *et al* (ed.), *Lawmaking in the European Union* (Kluwer, 1998), p. 290.

⁴ M. Cini, 'The Soft Law Approach: Commission Rule Making in the EU's State Aid Regime', 8 *Journal of European Public Policy* 2 (2001), p.193

agreements.⁵ The development of soft law depends on the nature of the specific instrument, however usually it forms out of negotiations and discussions between the involved parties. They are also the ones influencing the outcome and the purpose of the new soft law.⁶ As becomes evident, the very basic and probably most important feature of soft law is that it is not legally binding in itself. However, the ECJ held in the *Grimaldi case* that soft law instruments, in the case at hand a recommendation, that soft law can indeed produce legal effects.⁷ This is to mean that they should be taken into consideration by the courts when EU legislation is being interpreted. Snyder defines the effect of soft law as no independent legal effect. However, soft law does produce legal effect as it derives it from other sources of law.⁸ The question arises, what exactly the appeal of the employment of such interests for the institutions of the Union may be. The EU uses soft law for a variety of reasons. Here, especially, the use of soft law instruments has proven to be a very helpful measure in order to give credit to the very basic principles of the European law. As Senden acknowledges, the Union also aims at ‘(enhancing) the effectiveness, legitimacy and transparency of EU action’.⁹ Main fields of legislation where soft law has been used include the Common Foreign and Security Policy, employment law, education, culture, public health and competition law.¹⁰ The purposes of soft law are manifold and have been outlined by many scholars. Soft law instruments form an important part in the exercise of the principle of subsidiarity, as they, due to their very nature, constitute the least intrusive form of legislation one could think of. As introduced at the Edinburgh Summit 1992, and deeply linked to the principles of subsidiarity and proportionality, the non-binding instruments should be employed preferably where it is deemed to be appropriate.¹¹ It is obvious that soft law comes in extremely handy in particular in matters where the EU does not have exclusive competence, but not exclusively in these fields, as becomes clear in the case of competition law. The general advantages of soft law as oppose to hard law include that non-binding measures are more flexible, less expensive and less time consuming than ‘real’ legislation and they involve more expert opinions.¹² Further, soft law is a way of informing and educating the public of official opinions, attitudes and guidelines. It is a more easy way of guiding the officials in the application of Union law.¹³ However, frequently criticized is the lack of transparency of soft law. The Union soft law has the advantages for the institutions that they can also develop soft law even if they have no competence in legislation assigned under the treaties.¹⁴ Looked at from a different angle, one could also see this as a rather negative characteristic, as it gives the judiciary and the executive a dominant role, while the legislator’s role can be easily disregarded and slimmed.¹⁵ Other points of criticism circle around the question of affectivity of soft law as it is not legally binding and therefore dependent on the arbitrariness of the different actors and it is further not challengeable before a court. These enforcement issues lead to a reduction of legal certainty of soft law.¹⁶ It is still unclear what the role of soft law should be. This will be further

⁵ M. Cini, 8 *Journal of European Public Policy* 2 (2001), p.194; . Chalmers *et. al*, *European Public Law – Texts and Materials*, (Cambridge University Press, 2010), p.101

⁶ G. Howells, “Soft Law in EC Consumer Law“, in P. Craig et al (ed.), *Lawmaking in the European Union* (Kluwer, 1998), p. 311

⁷ F. Beveridge *et al*, in P. Craig et al (ed.), *Lawmaking in the European Union*, p. 290

⁸ F. Snyder, 56 *Modern Law Review* (1993), p.20

⁹ L. Senden, 9 *Electronic Journal of Comparative Law* 1 (2005), p. 1

¹⁰ D. Chalmers *et. al*, *European Public Law – Texts and Materials*, p.101

¹¹ L. Senden, 9 *Electronic Journal of Comparative Law* 1 (2005), p.5

¹² G. Howells, in P. Craig et al (ed.), *Lawmaking in the European Union*, p.313

¹³ M. Cini, 8 *Journal of European Public Policy* 2 (2001), p.193

¹⁴ F. Beveridge *et al*, in P. Craig et al (ed.), *Lawmaking in the European Union*, p.295

¹⁵ M. Cini, 8 *Journal of European Public Policy* 2 (2011), p.193

¹⁶ A. Sánchez Craells, ‘Soft Law and Private Enforcement of the EU Competition Rules’ (2010). Retrieved from <http://ssrn.com/abstract=1639851> (last visited on 7th December 2011), p.5

elaborated upon in Section III in which the paper addresses the inter-relation of hard and soft law.

3. *New Governance through Hybridity of Law*

The interaction between soft and hard law is one that is debatable as to extent and effectivity. All is linked to the question, what the role of soft law should be in times of change in matters of governance and whether or not hard law is more important. Experts agree that soft law should not be exploited in order to avoid coming to fixed conclusions, which hard law would provide.¹⁷ This fear is especially big concerning the Commission and can also be linked to the fear of the ‘competence creep’ within the Union. It seems that by many scholars, soft law is rather seen as a substitute for hard law as an alternative to it.¹⁸

Beveridge and Nott add that soft law has many benefits, however these are closely related to the interaction with hard law. Soft law can be a means of interpretation for hard law or it can be a base for the later creation of hard law, when details are still being worked out.¹⁹ They examine two legal theories on whether soft law can actually be considered law or not: the formalist and the contextual approach. The formalist approach indicates that soft law is a ‘pre legal variant in effect if not in form’ and can therefore be considered law. In contrast, based on the definition by Francis Snyder as quoted in Part II, soft law can be deemed to have ‘practical effects’, however, it only ‘operates in the shadow of the law’ and is therefore not law itself.²⁰

Scholars agree that soft law cannot exist alone but in order to be effective, there has to be some sort of co-existence with hard law. Soft law can then give expression to the general principles set out by hard law.²¹ It should further be noted that scholars do acknowledge that there may be a ‘collapse into hard law’ whereby soft law becomes hard when it is often employed by the Commission and the European courts.²² This comes close to the effects taking place in the international law sphere, where draft articles may become law with their frequent application. Of course, soft law can also collapse into hard law through the adoption of hard law instruments with the same contents. This is also called instrumental hybridity.²³ In these cases, soft law is seen as a ‘stepping stone to hard law rather than as an alternative to it’.²⁴

Dawson summarizes this problem as the ‘double-bind of soft law’. Soft law must create credibility through the exercise of power, however, the more it does so, the more the legitimacy of such power is doubted and the question is asked whether it is justifiable to let soft law ‘(override)...the necessary due process guarantees the Union’s legal structure offers’.²⁵

Nevertheless, it is commonly accepted that hard law is rather linked to traditional forms of governance, whereas the evolution of soft law has opened up possibilities for new forms of governance. New governance, according to Scott and Trubek is any governance model that

¹⁷ G. Howells, in P. Craig et al (ed.), *Lawmaking in the European Union*, p. 318

¹⁸ M. Cini, 8 *Journal of European Public Policy* 2 (2001), p.193

¹⁹ F. Beveridge et al, in P. Craig et al (ed.), *Lawmaking in the European Union*, p.291

²⁰ F. Beveridge et al, in P. Craig et al (ed.), *Lawmaking in the European Union*, p.292

²¹ G. Howells, in P. Craig et al (ed.), *Lawmaking in the European Union*, p. 317

²² A. Sánchez Craells, ‘Soft Law and Private Enforcement of the EU Competition Rules’ (2010), p. 13

²³ I. Maher, ‘Regulation and Modes of Governance in EC Competition Law: What’s new in Enforcement?’, 31 *Fordham International Law Journal* 6 (2007), p.1735,1739

²⁴ M. Cini, 8 *Journal of European Public Policy* 2 (2001), p.193

²⁵ M. Dawson, ‘Soft Law and the Rule of Law in the European Union: Revision or Redundancy?’, *Robert Schuman Centre for Advanced Studies* 2009/24, p. 4

derives from the ‘Classic Community Method (CCM)’.²⁶ The classic community method involves, according to the authors, mostly the traditional Union legislative instruments, like the commission’s exclusive initiative in the legislative process (the creation of hard law) and qualified majority voting.²⁷ In essence, this can be characterized as the centralized governance model, as De Visser points out.²⁸ The Union institutions and above all the Commission are the main bodies, to enforce the legislation and they derive their right to do so from hard law instruments (the treaties and secondary law).

According to the authors, there are two ways in which modern governance derives from the Classic Community Method. Firstly, there is ‘new, old governance’. This concept can basically be summarized as the creation of soft law norms as oppose to hard law legislative acts. The authors stress that the flexibility of these new types of law is the central characteristic that distinguishes them from the traditional law.²⁹ Here, the main features of the traditional governance models are still kept however. Secondly, there is the creation of completely different forms of governance³⁰ to which network governance can also be deemed to belong to. The association with new governance is closely linked to the agenda of the Lisbon summit.³¹

But what exactly are the characteristics of these supposedly new government models? Trubek and Trubek’s definition of new governance amounts to governance that has ‘the capacity to encourage experimentation, employ stakeholder participation, rely on broad framework agreements which have flexible and revisable standards and use benchmarks, indicators and peer review to ensure accountability’.³² It becomes clear that the authors indirectly list a number of soft law instruments, which indicates that new governance is closely linked with the introduction of soft law. This also becomes clear with De Búrca and Scott’s definition, as they propose that new governance particularly does not function through the ‘formal mechanism of traditional command-and-control type legal institutions’.³³ Command and control is a governance model in which there is a top-down approach where the executive is the only body ensuring enforcement of the law (a traditional model).

Maher claims that new governance is also closely linked with the Monnet method of governance.³⁴ As with the establishment of the ECSC, as the first example in European Integration, results are achieved among a group of states through the establishment of a network. Mutual dependence leads to adherence to the rules of the community. More specifically, this new phenomenon is referred to as network governance.³⁵ Slaughter defines network governance as ‘sets of direct interactions among subunits of different governments that are not controlled or closely guided by the policies of the executives of those governments’.³⁶ This means that the national governments are the ones to apply and enforce the European Law, all the while supervised and controlled by the actors within the network itself. This can be done by the commission or the national authorities, then called the European Regulators Group.³⁷

²⁶ J. Scott *et al*, ‘Mind the Gap: Law and new approaches to Governance in the European Union’, 8 *European Law Journal* (2002), p.1

²⁷ *Ibid.*

²⁸ M. de Visser, *Network Based Governance in EC Law*, (Hart Publishing, 2009), p.7

²⁹ J. Scott *et al*, 8 *European Law Journal* (2002), p.2

³⁰ *Ibid.*, p.4

³¹ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1721

³² *Ibid.*, p. 1723

³³ De Búrca *et al*, “Introduction“, in De Búrca *et al*, *Law and New governance in the EU and in the US*, (Hart Publishing, 2006), p.2

³⁴ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p. 1724

³⁵ M. de Visser, *Network Based Governance in EC Law*.

³⁶ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1730

³⁷ M. de Visser, *Network Based Governance in EC Law*, p. xxii

Coming back to the legal basis of such governance, the hybridity of soft and hard law, one can observe that lately, soft and hard law co-exist in the same policy areas³⁸ such as competition and employment law. Hybridity is the central term given to this rather new phenomenon of interaction between hard and soft law in EU governance.³⁹ It can, according to de Búrca and Scott, be divided into 3 categories in order to make the definition more comprehensible, namely baseline, instrumental and default hybridity.⁴⁰ In baseline hybridity, soft law has a gap-filling function to help complement the existing hard law. Instrumental hybridity incorporates the development of legal norms through new governance. The prominent ‘collapse into hard law’ is also part of this type of hybridity. Lastly, default hybridity, is ‘governance in the shadow of the law’.⁴¹ It is difficult to draw the line between these 3 categories, however they all equally involve hard law as a second component in the legal basis of governance.

4. Example 1: Employment Law, the OMC

One example of network governance can be observed, as mentioned before, in the field of social and employment policy: The Open Method of Co-Ordination (‘OMC’). This non-binding method was introduced with the European Employment Strategy (EES).⁴² The OMC’s governance is set up through six general principles: participation and power sharing, multilevel integration, diversity and decentralization, deliberation, flexibility and revisability and experimentation and knowledge creation.⁴³ Scott and Trubek mention the OMC explicitly as belonging to the second category of departure from the ‘CCM’, a form of new governance.⁴⁴

The conduct of the OMC is closely linked to the employment of soft law instruments. The agenda is set by the annual ‘Employment Guideline’, which is adopted by the European Council.⁴⁵ Then, each state issues its own action plan, which is then controlled by Commission and Council. Jointly, they issue the Employment Report and issue recommendations on how to achieve the envisaged results.⁴⁶ It is remarkable to see that all these measures can be classified as soft law instruments.

The question remains, however, what the contributions of soft law may be to the enforcement of employment law. This issue is, inter alia, addressed by Trubek, Cottrell and Nance. They outline the six main effects of soft law on the network and the work on the policy area. Shaming may result in the member states trying to comply with the guidelines in order to avoid negative critique by other member states. Diffusion through mimesis and discourse entails that the policy guidelines can easily be copied by the national authorities and constructed into a ‘new cognitive framework’. Further, an obvious effect is the networking power of the OMC, which like mentioned before, is able to incorporate more expert opinions. Also linked to the networking power of the OMC are the learning and deliberation effects

³⁸ DM Trubek *et al*, “‘Soft Law’, ‘Hard Law’, and European Integration: Toward a Theory of Hybridity”, *University of Wisconsin Legal Studies Research paper No. 1002* (2005); retrieved from <http://ssrn.com/abstract=855447> (last visited 7th December 2011), p.33

³⁹ *Ibid*, p.2

⁴⁰ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1729

⁴¹ *Ibid.*, p.1729

⁴² DM Trubek *et al*, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination’, 11 *European Law Journal* 3 (2005), p. 343

⁴³ DM Trubek *et al*, *University of Wisconsin Legal Studies Research paper No. 1002* (2005), p.15

⁴⁴ J. Scott *et al*, 8 *European Law Journal* (2002), p. 4

⁴⁵ D. Hodson *et al*, ‘The Open Method as a new Mode of Governance: the case of Soft Economic Policy Co-Ordination’, 39 *Journal of Common Market Studies* 4 (2001), p. 4

⁴⁶ D. Hodson *et al*, 39 *Journal of Common Market Studies* 4 (2001), p.4

through which knowledge can be easily transferred and transposed into highly functional policy decisions.⁴⁷ These effects have been categorized by Trubek and Trubek as either bottom-up or top-down effects.⁴⁸ Shaming is the prime example of a top-down effect, whereas deliberation can be categorized to be more a bottom-up effect.

The OMC is according to Dawson not based on the assumption of a collapse into hard law. It is actually expected to stay the way it is. This is because of the nature of the policy fields. In employment and social issues the EU only has limited legal competence. Harmonization is not an issue in this field, it is in fact never been an objective of the member states. It is therefore not a transitional form of governance but rather a 'permanent compromise'.⁴⁹

Questionable is whether the hybridity in the field of social and employment policy is actually more successful than a hard law approach. A research carried out by the authors of the book *Complying with Europe* suggests that this is in fact the case. According to the report, in which several employment acts and their enforcement were examined, the scholars found that enforcement is actually lacking in a number of cases. The case study also observed the number of cases in which an infringement procedure has direct effect and found that in 50% of the cases brought before the ECJ, no direct effect can be approved.⁵⁰ Trubek and Trubek's study provides the reader with the assumption by critics of soft law that hard law is an essential component in employment law, however the OMC could hinder the establishment of such hard law.⁵¹ However, the study carried out by the authors of *Complying with Europe* may suggest that hard law is actually not as effective as one might think (at least standing on its own) and therefore not the essential part of successful governance in the 21st century.⁵² This can maybe also be proven by the fact that the OMC is ever-expanding into other policy fields such as pensions, health, social inclusion and education.⁵³

5. Example 2: Competition Law, the ECN

The second prime example of network governance in the EU is the European Competition Network ('ECN'). The Network is comprised of the National competition authorities and commission officials.⁵⁴ The inclusion of soft law in competition law is not a new development. Soft law has been a distinct feature of competition law since the 1960s.⁵⁵ However, the interaction of hard and soft law has increased significantly with the modernization package Reg. 1/2003.⁵⁶ It entered into force on 1st May 2004.⁵⁷ It includes the Commission giving up its exclusive prerogative to enforce Art. 101,102 TFEU.⁵⁸ Though set up through a regulation (and therefore a legislative act) the ECN's rules and mechanisms are laid down in soft law instruments, namely six Commission notices.⁵⁹ The Regulation only sets out the basic rules under which the soft law rules should then be applied

⁴⁷ DM Trubek et al, *University of Wisconsin Legal Studies Research paper No. 1002* (2005), p. 17-18

⁴⁸ DM Trubek et al, 11 *European Law Journal* 3 (2005), p. 356

⁴⁹ M. Dawson, *Robert Schuman Centre for Advanced Studies* 2009/24, p.3

⁵⁰ G. Falkner, *Complying with Europe: EU Harmonisation and Soft Law in the Member States*, (Cambridge University Press, 2005), p. 219-227

⁵¹ DM Trubek et al, 11 *European Law Journal* 3 (2005), p.344

⁵² G. Falkner, *Complying with Europe: EU Harmonisation and Soft Law in the Member States*, p. 219-227

⁵³ DM Trubek et al, 11 *European Law Journal* 3 (2005), p. 351

⁵⁴ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1713

⁵⁵ Ibid, p.1723

⁵⁶ A. Sánchez Craells, 'Soft Law and Private Enforcement of the EU Competition Rules' (2010), p.6

⁵⁷ European Commission, 'What is the origin of the ECN', <http://ec.europa.eu/competition/ecn/faq.html#1>

⁵⁸ S. Wilks, 'The European Competition Network: What has changed?' (2007), retrieved from <http://aei.pitt.edu/8067/1/wilks%2Ds%2D08h.pdf> (last visited 7th December 2011), p.2

⁵⁹ M. de Visser, *Network Based Governance in EC Law*, p.33

in order to ensure their uniform application.⁶⁰ Further rules are then set out in soft law instruments such as the Notice on Cooperation with the Courts.⁶¹ De Burca and Craig in fact claim that the ECN was a ‘radical departure from existing institutional structures’.⁶²

The ECN currently has as its core function exchange of information between the NCAs, and therefore not a harmonization function.⁶³ The set up of the ECN fits into the Monnet model of governance, having a horizontal as well as a vertical component. Horizontally, all NCAs are equal and have enforcement powers granted to them under the respective TFEU articles.⁶⁴ Vertically, the Commission is the supervisor of the network, being the ‘first among equals’. All rights are obtained from the Commission, all obligations are held to the commission, making the NCAs accountable to the commission within the network.⁶⁵ The network has therefore been characterized as centralized as well as supranational.⁶⁶

Maher outlines the increasing hybridity in competition law by categorizing them in several new government modi. Firstly, one can witness a decentralization of authority. Authority is rather with the NCAs themselves and not with the EU⁶⁷ although it has to be kept in mind that the commission is still the supervisory body (centralized component). Secondly, as is typical and crucial to the employment of soft law is the flexibility that comes with it. Thirdly, a self-explanatory feature of network-based governance is the growing decentralization and focus on private actors.⁶⁸ The ECN aims at exchange of advice as well as evidence for competition law cases.⁶⁹

Wilks mentions, in his paper on the evolution of the ECN, criticism of the network as being not transparent enough. This being a typical criticism of soft law, one must still see the ECN as a highly successful mechanism.⁷⁰ To proof this point, the author references a study conducted by the expert journal *Global Competition Review* in which a ranking of similar Competition networks has been conducted. The ECN is ranked on first place equally with the US and UK institutions.⁷¹

6. Conclusion

We can conclude that the examples have shown how the Union has developed new governance models to cope with modernization. The ECN and OMC are perfect examples of why network governance seems to be so successful as oppose to traditional law enforcement methods. The changes in enforcement are in fact the most important feature of these new governance modes, as they are what sets the networks apart from traditional regulation of and by the Union. The development of soft law has proven to be inevitable in order to achieve these results. The paper has shown that one of the many benefits of soft law is its flexibility, which allows it to serve as the creator of new (network) governance in the European Union. It should not be disregarded however that this is, not due to soft law alone. It is rather a result of the hybridity of the law, the very effective combination of binding hard law and flexible soft law, without which network governance would probably be impossible to establish. To end,

⁶⁰ A. Sánchez Craells, ‘Soft Law and Private Enforcement of the EU Competition Rules’ (2010), p.8

⁶¹ Ibid, p.8

⁶² P. Craig *et al*, *The Evolution of EU law*, (Oxford University Press, 2011), p. 735

⁶³ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1731

⁶⁴ Ibid, p.1731

⁶⁵ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p. 1731

⁶⁶ S. Wilks, ‘The European Competition Network: What has changed?’ (2007), p.3

⁶⁷ I. Maher, 31 *Fordham International Law Journal* 6 (2007), p.1730

⁶⁸ Ibid, p.1730

⁶⁹ S. Wilks, ‘The European Competition Network: What has changed?’ (2007), p.2-3

⁷⁰ Ibid, p.3

⁷¹ Ibid, p.4

the paper should advert to the harmonization aspect of the law. Both examples are not aimed at harmonization of the member states laws. The harmonizing aspects of EU competition law, for example can be seen in the respective treaty articles, not in the European Competition Network's achievements. Therefore, the examples have also shown what soft law cannot achieve.

INCREASING USE OF THE INSTRUMENT OF REGULATION INSTEAD OF A DIRECTIVE: GOOD OR BAD?

Lisa Marx

1. Introduction

The impetus for this paper has been provided by a 2004 study on the use of legal instruments in European Union law as well as a 2011 empirical study on The European Union Policy-Making dataset. Both studies emphasize that Regulations are the most extensively used instrument passed by the Union legislator, especially by means of the consultation procedure and the ordinary legislative procedure. The results of these analyses, namely the decline in the use of the instrument of Directive in comparison to the rise of Regulations, will mainly be attributed to three core problems, outlined in detail in the main body of this paper. Regulations will be presented as means to realize the Union's objective of harmonizing EU law with national law in the appropriate competence fields much more efficiently, due to their advantages of clarity, predictability and effectiveness due to the uniform interpretation of EU law. These advantages will be highlighted by reference to the internal market and the Constitutional Treaty.

It shall be stressed that the empirical analysis explains the *status quo* of EU legislation. The subsequent comparative analysis aims at providing the necessary information to understand the *status quo* as regards Union legislation: Why and under which circumstances Regulations materialize as the more appropriate instruments for the purpose of harmonizing EU law with national laws, and *how* the decreasing use of Directives over the period from 1976 to 2010 can be explained. Reference will be made to different academic opinions, *inter alia* expressed by the European Commission towards the shift of the use of legislative instruments to Regulations.

Finally, this paper will highlight the attitudes of the European Union itself, the European Union citizens as well as the view of national parliaments as representatives of the Member States of the Union with regard to the delicate question whether the increasing use of the instrument of Regulation instead of a Directive is to be regarded as good or bad. A subjective conclusion will be drawn - mainly by reference to the point of view of the observer.

2. Regulation versus Directive: Uniformity versus Discretion

According to Article 288 of the Treaty of the Functioning of the European Union, the Union legislator shall exercise the Union's competences by means of Regulations, Directives, Decisions, Recommendations and Opinions. The characteristics of the former two legislative instruments are defined as follows:

*" [...] A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method. [...]"*¹

The central difference between these two legislative instruments lies in their binding effect: Whereas Regulations are described as having general application, Directives are only binding

¹ Article 288 TFEU.

on the Member States as to the result they sought to achieve. Hence, by means of Regulations, every Member State is required to give effect to the same legislative text and they therefore represent the most centralizing instrument of all legislative instruments² in the Union context. Regulations apply to objectively determined situations and produce legal effects as regards categories of persons described in a generalized and abstract manner.³ Consequently, the European Parliament jointly with the European Council or the Commission will pass Regulations whenever the need for uniformity is present.

Besides their general application, Regulations are also characterized by their direct applicability. Regulations automatically form part of the domestic legal order of the Member States from the day they enter into force. No further transposition or implementation is required. In fact, any further implementation of Regulations is illegal, as such measures may negatively affected the uniform application of Regulations⁴ in the Member States or mislead private parties from the direct source of their rights and obligations⁵ under EU law.

Directives highly contrast with Regulations: As the choice of form and method is left to the Member States in order to achieve the end result envisaged by Directives, Member States are awarded a considerably high degree of discretion to adjust the Union instrument to the national law peculiarities. Usually, Directives themselves define the deadline by which the Member States have to implement the Union measures into national law. During this period of implementation, the national authorities remain in control over the realization of EU law within their national legal framework⁶ and thereby leave some room of manoeuvre to the Member States. However, the effect of Directives should not be undermined by the fact that the Member States act within a margin of discretion as regards the implementation and adaption of Directives into the national law: The failure to implement a Directive within the implementation period will lead to state liability.⁷ In addition to the remedy of state liability, Directives are characterized by having vertical direct effect⁸ as well as indirect effect⁹, thus representing important enforcement mechanisms for this type of legislative instrument.

The decisive factor whether to opt for the instrument of Regulation or instrument of Directive is therefore represented by the *objective* the Union sought to realize. Directives are predominantly used to bring the national laws of the Member States in line with each other, and have been the prominent instrument with regard to the operation of the internal market.¹⁰ Regulations, in contrast, are a means to harmonize the law of the Member States in a more radical and absolute manner due to their centralizing effect. Practice has shown that especially in the area of private international law, Regulations present the preferred instrument in order to achieve Union objectives.¹¹

From the perspective of the legislative arguments presented, Regulations appear to be the preferred legislative instrument whenever the Union aims at exercising its authoritative powers. The legislative characteristics of Regulations – general and direct application, the overall binding effect and the protection of uniformity as regards the interpretation of EU law – ensure that the Union's Member States pursue the *Union's* course of conduct. Hence,

² Damian Chalmers, *European Union Public Law*, (2nd edition, Cambridge University Press, Cambridge 2010), p. 98.

³ Joined Cases 789/79 and 790/79 *Calpak v Commission* [1980] ECR 1949.

⁴ Case 39/72 *Commission v Italy (premiums for slaughtering cows)* [1973] ECR 101.

⁵ Case 34/73 *Variola v Amministrazione della Finanze* [1973] ECR 981.

⁶ European Commission, 'Application of EU law', http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (last visited: 05th December 2011).

⁷ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifazi v Italy* [1991] ECR I-5357.

⁸ Case 152/84 *Marshall v Southampton and SW Hampshire Area Health Authority* [1986] ECR 723.

⁹ Case 14/83 *Von Colson & Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

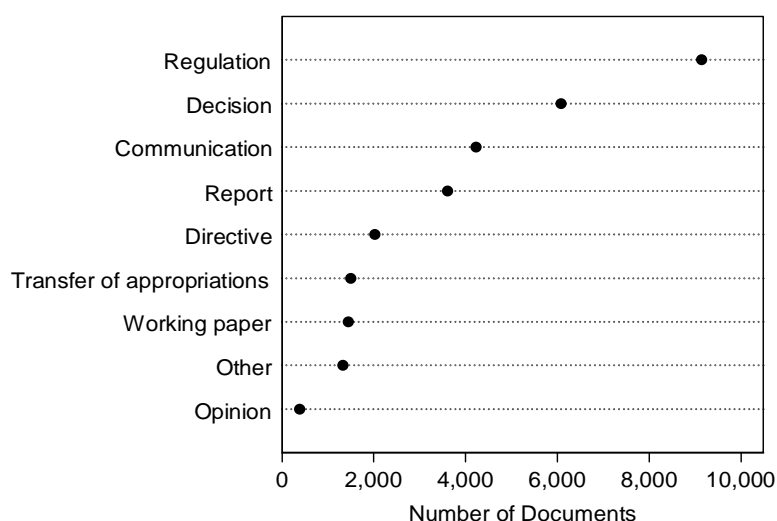
¹⁰ European Commission, 'Application of EU law'.

¹¹ N.A. Baarsma, *The Europeanisation of International Family Law*, (T.M.C. Asser Press, The Hague 2011), p.119.

Regulations are a greater means to exercise the Union's sovereignty and demonstrative primacy over national law. Directives, in contrast, rather present a softer course of cooperation between the Union and its Member States. Greater consideration is given to national peculiarities and traditions by the grant discretion. It seems as if the Member States and the Union operate on the same level of authority and legislative influence, which is definitely not the case as regards Regulations.

3. *Looking at Regulation versus Directive from a Different Perspective: An Empirical Overview of the use of EU Legislative Instrument from 1976 to 2010*

The shift in the legislative practice from using Directives to Regulations is more than just an observation. Empirical data confirms that the Union legislator focuses, especially during the last three decades, on the instrument of Regulation, which consequently results in the decrease of using the instrument of Directive for the purpose of harmonizing the national laws of the Member States of the Union. A 2004 study calculated that Regulations count for 31 per cent of all legislation, thereby representing the most widely used legislative instrument in the Union context.¹² Decisions present the second widely used instrument, counting for 27 per cent in case they are addressed to parties, and for ten per cent in case not being addressed to a party expressly.¹³ International agreements and Directives each only counted for nine per cent of all Union legislation.¹⁴



In line with the 2004 study is Frank Häge's¹⁵ research analysis *European Union Policy-Making Dataset*, presented in 2011, which provides comparative tables and figures as regards the use of legislative instruments and the types of procedures used in the European Union. For the purpose of this paper, the empirical data consulted focuses on the type of instrument passed by the Union legislator.

The table to the right shows the type of file by the total number of documents by type of file.¹⁶ 9,159 Regulations have been filed in 2010, whereas the number of Directives only counts for 2,023 documents.¹⁷ Häge's calculations in the context of the *total* number of documents filed

¹² A. v. Bogdandy, F. Arndt and J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', 23 *Yearbook of European Law* 91 (2004), p. 97.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Dr Frank M. Häge works as a lecturer in Politics in the Department of Politics and Public Administration at the University of Limerick in Ireland. In 2009, he received the best PhD Thesis Award 2009 of the University Association for Contemporary European Studies. His research interests concentrate on European Union Politics, International Cooperation and Conflict, as well as Quantitative and Comparative Research Methods.

¹⁶ Frank M. Häge, 'The European Union Policy-Making Dataset', 12 *European Union Politics* (2011), retrieved from <http://eup.sagepub.com/content/12/3/455> (last visited: 26th November 2011).

¹⁷ Ibid.

by the Union legislator in 2010, namely 29.772 documents, show that Regulations represent 30,73 per cent of all Union legislation.¹⁸ As the number of Directives filed in 2010 counts for 2.023 documents, meaning that only in 6,79 percent of all circumstances the Union legislator decided in favour of Directives.¹⁹ Comparing these results with the 2004 study presented above, the use of Directives has further decreased, from nine per cent of all Union legislation to approximately only seven per cent in 2010. Regulations, however, maintain their status as being the most widely used type of all legislative instrument: Their percentage counts still counts for approximately 31 per cent in 2010 as it was the case in 2004. Hence, the Union is rather inclined to file Regulations in order to realize Union objectives, thereby assuming a dominant position in the legislative process and exercising its primacy over national law in as many cases as possible.

Of course, advocates of Directives may argue that the decreasing use of Directives is a phenomenon, which only occurred in the 21st century, especially with regard to the principles of ever closer Union²⁰ incorporated by the Lisbon Treaty and the expansion of the internal market due to the Union enlargements in 2004, 2005 and 2007. Beyond doubt, these factors play a decisive role in the shift of the use of legislative instruments in favour of Regulations, as the need for uniformity and guiding legislation is definitely greater with 27 Member States. However, the decreasing use of Directives has already been apparent in the 1970s, meaning that the preference of Regulations for the achievement of the Union objectives is actually *not* a recent phenomenon.

The studies therefore confirm that the Union has assumed its dominant position through the *constant* filing of Regulations over the last three decades: The comparison of the number of legislative proposals by type of file made by the Union legislator during the period from 1976 to 2010, the following table is presented by Häge²¹:

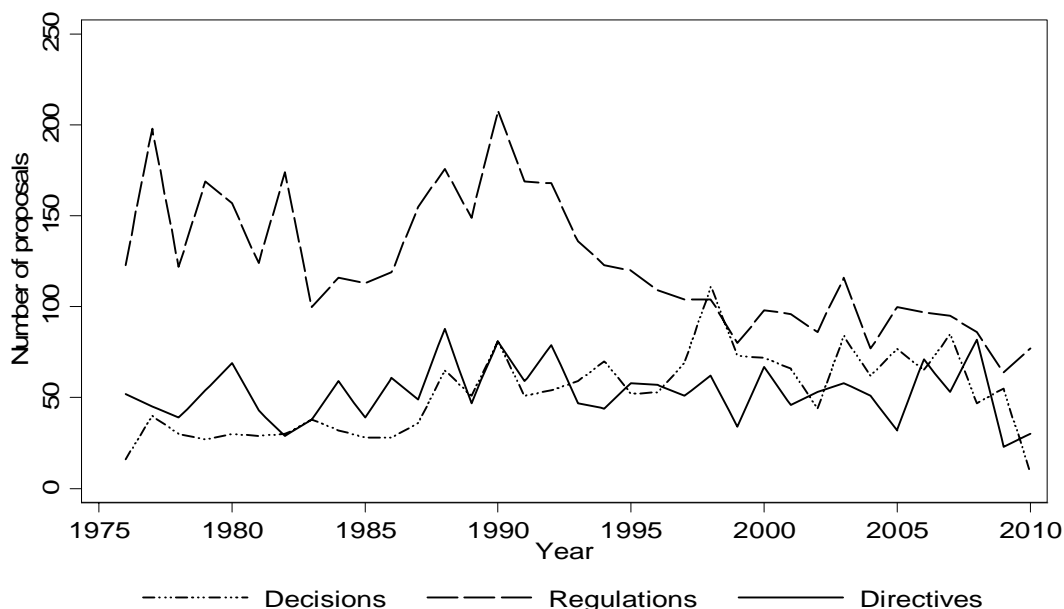


Fig. 2:
Number of legislative proposal by type of file from 1967 to 2010.

Considerably less legislative proposal have been presented by the Union legislator in 2010 than in 1976: Whereas in 1976 191 legislative proposals - including Regulations, Directives

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Art. 1(2) TEU

²¹ Häge, 12 *European Union Politics* (2011).

and Decisions – have been presented, the number counted in 2010 for only 116 proposals.²² This means that the Union legislator felt less need to pass legislation in 2010 than in for example 1976, or as the graphs show, in 1990. This consequently means that the need for uniformity and legislative consistency in 2010 is less high than it was at the beginning of the functioning of what now is the European Union. Secondly, the graphs show that Regulations have been the preferred instrument in contrast to Directives in consideration of the whole period from 1976 to 2010, without any exception.²³ The gap between the use of Regulations and Directives was considerably high in 1991, when approximately three times more Regulations have been proposed in contrast to Directives. This trend is leveling out in 2010, although still two and a half times more Regulations are proposed than Directives: 77 Regulations *versus* 30 Directives.²⁴ Once more, the Union enjoys being the legislative leader. Overall, the empirical analysis of the use of EU legislative instruments confirms the observation that the use of Directives is decreasing. By contrast, the use of the instrument of Regulation can be considered as continuously high, taking into consideration the period from 1976 to 2010. From a different angle, however, the use of Regulations is not necessarily increasing, as the percentage remained unchanged at 31 per cent of all Union legislation from 2004 to 2010. Personally, the empirical data rather confirms that, due to the fact that the Union is in less need to pass legislation as in comparison with the last three decades, the decreasing use of Directives is compensated by the use of Regulations. Thus, Regulations can remain their status as being the most widely used Union legislative instrument. This is, however, only a hypothesis.

4. *Going into Detail: Regulation versus Directive in the Academic Debate*

The decreasing use of Directives can be attributed to three major issues of consideration: Firstly, the improper use of Directives, which is closely related to the second point of dissatisfaction, namely the blurred distinction between Directives and Regulations and thirdly, the problem of adequately and timely implementing Directives into the law of the Union Member States in conjunction with the subsequent interpretation of these instruments by the national courts of the Member States. In this regard, the European Commission described Directives as an ‘*instrument hybride, et de statute ambigu*’,²⁵ thereby referring to the complex – in my point of view highly technical - character of Directives. As their status is said to be *ambiguous*, an ultimate definition of Directives has not been provided yet, which presents itself as an obstacle to legal certainty.

Pinpointing these disadvantages as regards Directives draws attention to proposals to replace them, which have regularly been issued during the history of the European Union: During the Intergovernmental Conference leading to the establishment of the European Union, a replacement proposal for Directives was explicitly made:²⁶ The essence of the instrument of Directive was proposed to be recycled by creating a new legislative instrument, establishing basic principles of the Union and leaving the Member States a considerable degree of discretion as to their implementation.^{27,28} In 1992, the Sutherland Report announced the recommendation of transforming Directives into directly applicable Regulations, on the

²² Ibid.

²³ Häge, 12 *European Union Politics* (2011).

²⁴ Ibid.

²⁵ Sacha Prechal, ‘Adieu à la Directive?’, 1 *European Constitutional Law Review* (2005), p. 2.

²⁶ Though finally nothing came off but a Declaration on the Hierarchy of Community Act, which was annexed to the Maastricht Treaty.

²⁷ Prechal, 1 *European Constitutional Law Review* (2005), p. 4.

²⁸ A comparable concept reappeared recently again in the ‘Penelope’ Feasibility Study, Contribution to a Parliamentary Draft Constitution of the European Union, 4 Dec. 2004, Art. 77 on ‘European Laws’.

condition that a certain degree of approximation of the laws of the Union Member States through the use of Directives has been realized.²⁹ In line with these proposals are the Molitor Report of 1995 as well as the White Paper on European Governance issued in 2001, which argue for the replacement of Directives for the sake of legal certainty and transparency of Union law. In addition to the proposals made, the Constitutional Treaty argued for the abolishment of Directives, which would have been compensated by the evolvment of a new legislative label, absorbing the peculiar characteristics of Directives.³⁰

Overall, the proposals made stress the need for guarantee of the uniform application and interpretation of Union legislation, and on the other hand the importance of a single point of reference for individuals, *inter alia* subjects of EU law, as well as national courts for the enforcement of their rights in the Union framework.³¹ From these proposals' perspective, the Directive as such is rather viewed negatively, as it fails to successfully guarantee these legislative needs. However, as these proposals have never been legally materialized, the Directive is said to have survived them, in the sense of rebutting criticism.

From a jurisprudential point of view, the case law of the European Court of Justice to a large extent blurred the distinction between Directives and Regulations.³² This evidence provides proof for the second point of criticism. Moreover, practical reality has proven that at least some room of manoeuvre for the Member States is required to fully adapt their national laws to EU Regulations, although this may be forbidden on paper. By contrast, the Union tends to draft Directives as detailed and precise as possible, thereby actually drafting '*lois uniformes*'.³³ Hence, the gap between Directives and Regulations grows smaller: The Directive becomes akin to the Regulation, and *vice versa*. Consequently, the distinction between 'The Big Two' is further blurred.

Apart from the theoretical debate for the replacement of Directives, the degree of discretion awarded to the Member States under the instrument of Directive has proved in practice to leave *too much* freedom of implementation by choosing form and method, thus exceeding the acceptable room of manoeuvre. In contrast, piece-meal transposition³⁴ also works perfectly. The alternative route provided by the Union legislator itself to counteract deviation and tactic piece-meal techniques is the Regulation. As indicated by the European Commission in this regard, the replacement of Directives by means of Regulations, where this is both legally possible and politically acceptable, simplifies the immediate application of Union law and provides the opportunity of directly invoking the rights mediated through the Regulation by private parties.³⁵

More recently, Professor Mario Monti advocated the shift to Regulations in his Report *A New Strategy for the Single Market*³⁶. Although acknowledging the greater possibility of adjusting of national rules and preferences to Directives concerning the internal market,³⁷ the implementation period for Directives is highly time-consuming due to the risk of non-implementation or incorrect implementation. In this regard, Monti attributes the decreasing use of the instrument of Directive in the field of the internal market to the three core

²⁹ Prechal, 1 *European Constitutional Law Review* (2005), p. 4.

³⁰ Christian Twigg-Flesner, 'Good-bye Harmonisation by Directives, Hello Cross-Border only Regulation? – A Way Forward for EU Consumer Contract Law', 2 *European Review of Contract Law* 7 (2011), p. 8.

³¹ Prechal, 1 *European Constitutional Law Review* (2005), p. 4.

³² Ibid.

³³ Ibid.

³⁴ Piece-meal transposition is the approach taken by, for example, the United Kingdom as regards the implementation of Directives.

³⁵ Commission, *A Europe of results - applying community law*, COM (2007) 502 final, n.12; Commission, *Working document - Instruments for a modernised single market policy*, SEC (2007) 1518.

³⁶ Mario Monti, *A New Strategy For The Single Market – At the Service of Europe's Economy and Society*. (Brussels, 2010). Retrieved from http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf; (last visited: 05th December 2011).

³⁷ Monti refers to the fact that currently 80 per cent of the single market rules are set out through Directives.

advantages of Regulations: Clarity, predictability and effectiveness.³⁸ He furthermore recalls the argument of greater enforceability of rights generated by Regulations to private parties.³⁹ However, he admits, Regulations cannot be used in isolation from any considerations of the legislative *status quo* of the Union and its Member States: The instrument of Regulation is perfectly deployable to the management of new areas, in which the need of harmonization is faced with regard to limited interaction between the Union and the national legal systems.⁴⁰

Looking at Regulations from the flipside of the coin, the Commission refers to legal impossibility as well as political unacceptability as the two predominant constraints with regard to the increasing use of Regulations instead of Directives. Recalling that Regulations would – especially to the advantage of the functioning of the internal market and EU consumer contract law according to Twigg-Flesner – create a single and coherent set of law, Member States would be deprived of using national terminology and concepts when implementing Directives.⁴¹ However, due to the doctrine of consistent interpretation, Directives have to be transposed and applied into national law in line with European law in any way,⁴² which deprives the Member States of their freedom to regulate cross-border disputes. In this regard, Regulations offer the advantage of leaving no room for questions about the relevant European law and its application.

Civil law systems are inclined to regard Regulations as a considerable threat to their civil codes, as they argue for the preservation and integrity of their civil codes, which would be challenged by the integration of Regulations into the domestic law.⁴³ Nevertheless, this argument presented cannot amount to legal impossibility as far as the preference of Regulations to the detriment of Directives is considered. As Twigg-Flesner argues, the shift to Regulations only confirms legal practice reality: Directives seem to be de facto Regulations, and vice versa. Directives are drafted in such detail containing technical rules that Member States are in any case not able to deviate from the text presented in a Directive.⁴⁴ As both legal instruments grow alike, the use of Regulations is firstly practically and secondly legally possible in *reality*, although theory may indeed differ and present the shift as impossible.

The second constraint presented by the Commission concerns political unacceptability, which is probably the argument lobbied by the national parliaments of the Member States. The more Regulations are in force, the more influence, sovereignty and authority gains European law and the less would domestic law be of relevance. National parliaments would rightfully question the rationale for this reduction of legal competence. Recalling criticism, for example the competence creep and the democratic deficit of the European Union, national parliaments may over the course of time and with the increase of political and legal power due to the shift to Regulations consider the Union as a rival, and no longer as a route for European integration.

5. Conclusion: Drawing the Threats Together

Regulation *versus* Directive –an EU Law superstar, mutant and survivor *versus* clarity, predictability and effectiveness. This paper aimed at pinpointing the (dis)advantages of both legislative instruments and the reasons for the shift in legislative emphasis from Directives to Regulation from firstly an empirical and secondly a comparative point of view. The 2004 study as well as the study presented by Häge prove that the Union legislator is more inclined

³⁸ Monti, *A New Strategy For The Single Market – At the Service of Europe's Economy and Society*.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Twigg-Flesner, 2 *European Review of Contract Law* 7 (2011), p. 8.

⁴² Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación* [1990] ECR I-4135.

⁴³ Twigg-Flesner, 2 *European Review of Contract Law* 7 (2011), p. 8.

⁴⁴ P. Rott; 'Minimum harmonisation for the completion of the internal market? An example of consumer sales law', 40 *Common Market Law Review* (2003), p. 1107-1135.

to use Regulations, in order to make EU law fully applicable in the domestic systems of its Member States. The analysis of the empirical data leads to the conclusion that the Regulations presents itself as a well-working, continuous legislative instrument, which takes great preference over the Directive. Although the need for legislation declined, the Regulation is still the most-widely used instrument, meaning that the fields in which legislation still develops is either directly covered by the use of Regulations or substituted by a Regulation to the detriment of Directives, which is now the case as regards legislation for the internal market. Therefore, it is possible to say that the decrease in the use of Directives is *compensated* by the use of Regulations.

It stands to reason that both the comparative and the empirical observations ask whether we are actually still in need for Directives after all. Why does the Union not simply legislate by means of Regulation? Would Regulations not be better timesaving as well as preventing legislative battles between the Union and its Member States? According to the authors' view expressed, they would. Regulations work more efficiently, continuously and directly. According to the Union's history however, they would not. Directives are a vital part of the EU legislative framework, during *good* and *bad* times. Whether the Directive will ever strike the happy medium between good and bad is highly questionable. In my personal opinion, it is the Directive's extraordinary, controversial and ambiguous character, which greatly contributes to its legislative survival. The Union should decide for Directives whenever the field of European law so requires, as this is in my personal view important to enhance cooperation and the well functioning of the Union. Regulations sometimes seem to be too radical by conveying too much EU dominance, and sometimes being far in excess of what is necessary to achieve the Union's course of conduct.

After all, this paper therefore leaves the question whether the increasing use of Regulations instead of Directives is to be regarded as good or bad to the eye of the beholder. The Union surely welcomes this increase, as it enhances its legislative authority, sovereignty and primacy over national laws. Individuals may also consider the increase as an improvement of the protection of their rights under EU law by making the Member States directly responsible for their failures under EU law and providing greater possibilities for private remedies. In contrast, the Member States itself and their national parliaments may legitimately consider the legislative developments as plainly bad. Deprived of their legislative discretion, the room for manoeuvre and adjustment of EU law into the national law decreases considerably. Adherence to EU law ultimately questions whether the Member States are still the masters of the European Union, or whether the Union itself has assumed the authority to function on its own, albeit considering the doctrine of conferral of powers.

PLAUMANN AND THE STANDING OF ENVIRONMENTAL ORGANIZATIONS

Katja Zimmerman

1. Introduction

Under Article 263 TFEU, non-privileged applicants have to meet the criteria of individual and direct concern in order to acquire *locus standi* before the General Court¹ (and before the Court of Justice of the European Union in case of appeal²) if they challenge a legislative act which is not addressed to them.³ In *Plaumann v. Commission*⁴ the Court of Justice of the European Union elaborated on the concept of ‘individual concern’ and set out criteria (the so-called *Plaumann* criteria⁵) to determine whether individual concern exists in a particular case.⁶ It is common consensus in the legal doctrine that the *Plaumann* criteria are strict and difficult to meet: especially for interest groups.⁷ The latter was particularly shown in the case *Greenpeace and Others v. Commission* where the General Court held that the action was inadmissible because of the fact that Greenpeace did not have *locus standi* due to a lack of ‘individual concern’.⁸ In appeal, this was affirmed by the Court of Justice of the European Union.⁹

This paper will in the following concentrate on the question whether the standing of environmental organizations under Article 263 TFEU should be expanded or whether the current system has to be classified as being capable of fulfilling the needs of the European society. In order to answer this question, the *Plaumann* criteria will be analyzed. Second, prominent case law of the General Court and the Court of Justice of the European Union will be presented to demonstrate that the European courts¹⁰ have not yet acknowledged ‘individual concern’ in cases where an environmental organization started proceedings under Article 263 TFEU. Afterwards, the impact of the Aarhus Convention¹¹ will be examined in the light of

¹ Art. 263 para. 4 TFEU juncto Art. 256 para. 1 TFEU juncto Art. 51 of Protocol (No 3) on the Statute of the Court of Justice of the European Union.

² A. El-Agraa & B. Ardy, *The European Union: Economics and Policies*, (Cambridge University Press, Cambridge 2011), p. 49. Also see I. van Bael, *Due Process in EU Competition Proceedings*, (Kluwer Law International 2011), p. 366.

³ A. Kaczorowska, *European Union Law*, (Routledge-Cavendish, New York 2008), p. 450-451. Also see A. Limante, ‘Actions for Annulment before ECJ after the Lisbon Treaty: has the access to justice improved?’, <http://egpa-conference2011.org/documents/PSG10/LIMANTE.pdf> (last visited 05.12.2011), p. 2-3 and D. Chalmers, *European Union Public Law*, p. 414.

⁴ Case 25/62, *Plaumann v. Commission* [1963] ECR 199.

⁵ T. Tridimas & P. Nebbia, *European Union Law for the Twenty-First Century*, (Hart Publishing, Oxford 2004), p. 38-39.

⁶ Case 25/62, *Plaumann v. Commission* [1963] ECR 199 para. 4.

⁷ M. Eliantonio & N. Stratieva, ‘From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: the locus standi of private applicants under Art. 230(4) EC through a political lens’, *Maastricht Faculty of Law Working Paper 2009/13* (2009), p. 2. Also see D. Chalmers, *European Union Public Law*, p.425 and T. Tridimas & G. Gari, ‘Winners and Losers in Luxemburg: a Statistical Analysis of Judicial Review before the European Court of Justice and the Court of First Instance’ 35 *ELRev.* 2 (2010), p. 131-173.

⁸ Case T-585/93 *Greenpeace and Others v. Commission* [1995] ECR II-2205. Also see R. Macrory, *Regulation, Enforcement and Governance in environmental law*, (Cameron May, London 2008), p. 596.

⁹ Case C-321/95 P *Greenpeace and Others v. Commission* [1998] ECR I-1651. Also see T. Treves a.o., *Civil Society, International Courts and Compliance Bodies*, (T.M.C Asser Press, The Hague 2005), p. 152.

¹⁰ For the purpose of this paper, the term ‘European courts’ shall include the General Court as well as the Court of Justice of the European Union.

¹¹ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998).

access to European courts in case of NGOs. Fourth, on arguments supporting extension of the standing will be elaborated. Hereby, the cases *UPA*¹² and *Jégo-Quéré & Cie v. Commission*¹³ will form a substantial part of the discussion. Subsequently, arguments opposing this extension will be examined. In the end, the conclusion will be drawn that an extension of the standing of environmental organization should be considered and that such an extension can be defended on a legal basis.

2. *The Plaumann Criteria: the Need for Non-Privileged Applicants to Demonstrate 'Individual Concern'*

In 1963 (in the case *Plaumann v. Commission of the EEC*), the Court of Justice of the European Union laid down the criteria for non-privileged applicants to prove that 'individual concern' is present when a legislative act is challenged in a proceeding under Art. 263 TFEU before a European court.¹⁴

In the *Plaumann* case, Germany wanted to abrogate a certain import tax that had to be paid by importers of clementines.¹⁵ In order to be legally able to do so, Germany was required to receive the Commission's consent first.¹⁶ However, the Commission did not approve Germany's plans.¹⁷ As a consequence, Plaumann, being an importer of clementines himself, started proceedings before the General Court, asking to annul this Commission's Decision.¹⁸ The most surprising aspect of the judgement is how the Court began its argumentation.¹⁹ In the second paragraph of the Court's argumentation, it is stated that Article 263 TFEU 'neither defines nor limits the scope of (individual and direct concern). The words and the natural meaning of this provision justify the broadest interpretation'.²⁰ The Court goes even further by arguing that parties may not be deprived of their right of access to the European courts caused by a too restrictive approach of the article in question.²¹ This is surprising in that far as that this Court in the course of its judgment established that 'individual concern' exists only if a 'decision affects [applicants] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually'.²² The wording of the so-called *Plaumann* criteria and their adoption in the case law of the European courts demonstrate until today how difficult the proof of 'individual concern' is.²³ These criteria therefore act as a barrier between

¹² Case T-173/98 *Union de Pequenos Agricultores v. Commission* [1999] ECR II-3357. On appeal: Case C-50/00 *P Union de Pequenos Agricultores v. Council* [2002] ECR I-6677

¹³ Case T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365. On appeal: Case C-263/02 *P Jégo-Quéré & Cie v. Commission* [2004] ECR I-3425.

¹⁴ Case 25/62, *Plaumann v. Commission* [1963] ECR 199, para. 4. Also see M. M. Slotboom, *A comparison of WTO and EC law: do different objects and purposes matter for treaty interpretation?*, (Cameron May, London 2006), p. 217.

¹⁵ Case 25/62, *Plaumann v. Commission* [1963] ECR 199. Also see D. Chalmers, *European Union Public Law*, p. 418.

¹⁶ Ibid.

¹⁷ Ibid..

¹⁸ Ibid.

¹⁹ Appendix 1: Detailed Analysis of the Court's Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

²⁰ Also see S. Weatherill, *Cases and Materials on EU law*, (Oxford University Press, New York 2007), p. 217.

²¹ Case 25/62, *Plaumann v. Commission* [1963] ECR 199, 2nd para. of the Court's actual judgment. Also see Appendix 1: Detailed Analysis of the Court's Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

²² Case 25/62, *Plaumann v. Commission* [1963] ECR 199, para. 4. Also see P. Craig & G. de Burca, *EU law: text, cases, and materials*, (Oxford University Press, New York 2008), p. 517.

²³ S.D. Phillips & S. Rathgeb Smith, *Governance and Regulation in the Third Sector: International Perspectives*, (Routledge, New York 2011), p. 176. To that effect also see Case T-585/93 *Greenpeace and Others v.*

the European courts and the non-privileged applicants and are, as a consequence, subject to criticism.²⁴

3. The Standing of Environmental Organizations under Article 263 TFEU as of Today

Although the *Plaumann* criteria were established almost half a century ago, they are still rigorously applied in cases where environmental organizations try to start proceedings before the General Court (as well as in cases of appeal before the Court of Justice of the European Union).²⁵ This led to the circumstance that cases in which the European courts acknowledged that environmental organizations successfully passed the criterion of ‘individual concern’ are non-existent.²⁶

In the following, it will be discussed how the General Court and the Court of Justice of the European Union examine the standing of environmental organizations. Due to the structural limits of this paper, the focus will be laid on three prominent judgments of the European Courts: *Greenpeace and Others v. Commission*²⁷, *EEB and Stichting Natuur en Milieu v. Commission*²⁸ and *WWF v. UK*²⁹.

3.1 Greenpeace and Others v. Commission

In the case *Greenpeace and Others v. Commission*, the standing of environmental organizations under Article 263 TFEU was examined by the General Court for the first time.³⁰ In this case, Spain received funds from the EU in order to construct two power plants – one in Gran Canary and one in Tenerife.³¹ Greenpeace, together with two other environmental organizations and inhabitants of these islands started proceedings before the General Court against this financial aid.³²

Whereas the inhabitants of Gran Canary and Tenerife argued that they meet the condition of ‘individual concern’ because of the fact that they ‘have suffered or will suffer detriment or

Commission [1995] ECR II-2205; Case T-236/04, *EEB and Stichting Natuur en Milieu v. Commission* [2005] ECR; Case T-91/07, *WWF-UK Ltd. v. Council of the European Union* [2008]; C-321/95 P *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1998] ECR I-1651; Case T-177/01 *Jégo-Quéré & Cie v. Commission*, [2002] ECR II-2365; Case T-37/04, *Região autónoma dos Açores v. Council* [2008] ECR II-103.

²⁴ J. Fairhurst, *Law of the European Union*, (Pearson Education Limited 2007), p. 238. Also see M. M. Slotboom, *A comparison of WTO and EC law: do different objects and purposes matter for treaty interpretation?*, p. 207.

²⁵ E. Kirk, *EU law*, (Pearson Education Limited 2009), p. 50. Also see G. Bebr, *Developments of judicial control of the European communities*, (Martinus Nijhoff Publishers, The Hague 1981), p. 227. To that effect also see Case T-236/04 *EEB and Stichting Natuur en Milieu v. Commission* [2005] ECR and Case T-91/07 *WWF-UK Ltd. v. Council of the European Union* [2008].

²⁶ E. Chiti & B.G. Mattarella, *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, (Springer Verlag, Heidelberg 2011), p. 379. Also see M. Eliantonio, *The Aarhus Convention and access to justice for environmental NGOs before courts in the EU: good news with a bitter aftertaste*, *Effectius Newsletter* 14 (2011), p. 5.

²⁷ Case T-585/93 *Greenpeace and Others v. Commission* [1995] ECR II-2205.

²⁸ Joined cases T-236/04 and T-241/04, *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission* [2005] ECR II-04945.

²⁹ Case T-91/07 *WWF-UK Ltd. v. Council of the European Union* [2008] ECR II-00081. On appeal before the Court of justice of the European Union see Case C-355/08 P *WWF-UK Ltd. v. Council of the European Union* [2008] ECR I-73.

³⁰ Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 concerning Compliance by the European Union of 14.03.2011, p.5.

³¹ U. Haltern, *Europarecht: Dogmatik im Kontext*, (Mohr Siebeck, Tübingen 2007), p. 270. Also see P. Kent, *Law of the European Union*, p. 131.

³² *Ibid*, p. 271.

loss' resulting from the grant of the fund which on itself has great impact on the environment³³, the environmental organizations adduced that they

'should be considered to be individually concerned by reason of the particularly important role they have to play in the process of legal control by representing the general interests shared by a number of individuals in a focused and coordinated manner'.³⁴

Additionally, they argue that their members do not lack 'individual concern' and that in such a case, the European courts had earlier acknowledged the standing of the representing organization.³⁵

However, the General Court, applying the Plaumann criteria, gave three reasons to support their conclusion that neither the Spanish inhabitants nor the environmental organizations did have standing.³⁶ First, it was held that the individual plaintiffs' position does not differ from that of the other inhabitants of the two Spanish islands.³⁷ Second, it was argued that the three environmental organizations could not be qualified as being individually concerned because of the fact that the people they represent do not possess 'individual concern' themselves either.³⁸ Third, in paragraph 62 of the judgement, the Court explicitly responded to Greenpeace, stating that it was not 'in any way the interlocutor of the Commission with regard to the adoption of the ... decision' and that it 'cannot [...] claim to have any specific interest distinct from that of its members'.³⁹ The Court of Justice of the European Union upheld the judgement of the General Court in appeal.⁴⁰

3.2 European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission

In the case EEB and Stichting Natuur en Milieu v. Commission, the applicants aimed to annul EU Commission Decisions that contained the permission to keep using atrazine and simazine although it could not be excluded that this could have adverse consequences for health issues on the one hand and for the environment in on the other hand.⁴¹ The EEB consisted of 145 different environmental organizations that were spread over the EU.⁴²

EEB and Stichting Natuur en Milieu first argued that they fulfill the criterion of individual concern because of the fact that these Commission decisions result in a regression when it comes to environmentalism.⁴³ Second, they stated that their activities are in the field of environmentalism 'in the context of Directive 92/43 and that, in that capacity, the EEB has a

³³ Case T-585/93 *Greenpeace and Others v. Commission* [1995] ECR II-2205, para. 30. Also see Appendix 1: Detailed Analysis of the Court's Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

³⁴ Ibid, para. 39.

³⁵ Ibid, paras. 37-38.

³⁶ Ibid, paras. 56-62. Also see D. Chalmers, *European Union Public Law*, p. 426-427.

³⁷ Ibid, paras. 56 and 60. Also see Appendix 1: Detailed Analysis of the Court's Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

³⁸ Ibid, para. 59.

³⁹ Ibid, para. 62.

⁴⁰ D. Chalmers, *European Union Public Law*, p. 426.

⁴¹ M. Eliantonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*, under 2. Also see Order of the CFI in Joined cases T-236/04 and T-241/04, *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission* [2005] ECR II-04945, paras. 13-18.

⁴² Ibid.

⁴³ Order of the CFI in Joined cases T-236/04 and T-241/04, *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission* [2005] ECR II-04945, para. 54. Also see M. Eliantonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*, under 2.

special consultative status with the Commission and other European Institutions’.⁴⁴ Third, the plaintiffs held that an action before the General Court would be the most efficient legal instrument to challenge the Commission Decision since otherwise they would have to start proceedings in all of the 27 Member States of the EU.⁴⁵

The General Court followed the line of case law regarding the cases *Plaumann v. Commission and Greenpeace and Others v. Commission* and therefore decided that the applicants do not have ‘individual concern’.⁴⁶ Even the circumstance that EEB participated ‘in the process leading to the adoption of a Community act’ did not alter this conclusion of the court.⁴⁷ Most notably, in paragraphs 71 and 72 of that judgment, the court pointed out that even the application of the Aarhus Convention (which will be dealt with under 3.4), which was already in force at the time the court delivered its judgment, could not result in the grant of *locus standi*.⁴⁸

3.3 WWF-UK Ltd. v. Council of the European Union

In the case *WWF v. UK* the applicant started an action before the General Court to annul certain parts of Council Regulation 41/2007 that deals with fishing activities in the EU.⁴⁹ It has to be mentioned that the applicant participated in the Executive Committee of the North Sea Regional Advisory Council, which counseled the European Commission.⁵⁰ That circumstance formed part of the plaintiff’s argumentation that ‘individual concern’ is present.⁵¹

Again, the General Court as well as the Court of Justice of the European Union on appeal refused to acknowledge the ‘individual concern’ of the plaintiffs, stating that only the Executive Committee of the North Sea Regional Advisory Council itself and therefore not individual members of that council could prove ‘individual concern’.⁵²

3.4 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (‘Aarhus Convention’)

The Aarhus Convention was signed on 25 June 1998 in Denmark and aims to strengthen – as the official title of this Convention states – ‘public participation in decision-making and access to justice in environmental matters’.⁵³ Although this convention is an international

⁴⁴ Ibid, para. 45.

⁴⁵ Ibid, para. 46. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁴⁶ Ibid, paras.51-61. Also see M. Elia Antonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*, under 2.

⁴⁷ Ibid, para. 58. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁴⁸ Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁴⁹ Case C 355/08 P *WWF-UK Ltd. v. Council of the European Union* [2008] ECR I-73, para. 1. Also see D.Bünger, *Deficits in EU and US Mandatory Environmental Information Disclosure: Legal, comparative legal and economic facets of pollutant release inventories*, (Springer Verlag, Heidelberg 2011), p. 215.

⁵⁰ Ibid.

⁵¹ Ibid, para. 55. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁵² Ibid, paras 66-69. On appeal before the Court of Justice of the European Union see Case C 355/08 P *WWF-UK Ltd. v. Council of the European Union* [2008] ECR I-73. Also see M. Elia Antonio, *Effectius Newsletter* 14, p. 5. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁵³ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (‘Aarhus Convention’) (1998). Also see Findings and Recommendations of the

legal instrument, it is nevertheless relevant in this discussion, since the EU is one of its signatories.⁵⁴ Its ratification in the EU followed on 17 February 2005 through Decision 2005/370/EC⁵⁵.⁵⁶ For the purpose of this paper, Article 9 of the Aarhus Convention is the most important provision of this convention since it lays down the right for parties (including NGOs) to have access to justice.⁵⁷ Hereby, the NGOs – if meeting the conditions laid down in paragraph 5 of Article 2 of the Aarhus Convention – only have to demonstrate that they have ‘a sufficient interest’ or that they maintain ‘impairment of a right, where the administrative procedural law of a Party requires this as a precondition’.⁵⁸ The Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part 1) concerning Compliance by the European Union has already come to the conclusion that the EU does not comply with Article 9 of the Aarhus Convention because of the fact that environmental organizations were denied access to the European courts in cases where they had started proceedings.⁵⁹ In order to implement the Aarhus Convention, the EU has adopted several pieces of legislation, under which Regulation No 1367/2006.⁶⁰ According to Art.12 of that regulation ‘the non-governmental organization which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty’.⁶¹ The last part of this Article refers to Article 263 TFEU.⁶² It is crucial and – as a consequence – widely discussed in legal doctrine because of the fact that it is not set out how the relationship between this part of the provision and Article 263 TFEU should look like.⁶³ The question remains whether Art.12 of the Aarhus Regulation has to be strictly interpreted, similar to the *Plaumann* criteria under Article 263 TFEU or whether this regulation could open the possibility to grant environmental organizations wider access to

Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part 1) concerning Compliance by the European Union, adopted on 14.04.2011 (<http://www.endseurope.com/docs/110428a.pdf>), para. 57.

⁵⁴ G-S KREMLIS, *The Aarhus Convention and its implementation in the European Community*, (http://www.inece.org/conference/7/vol1/22_Kremlis.pdf), p. 141. Also see M. Eliantonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*.

⁵⁵ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1.

⁵⁶ A. Follesdal a.o., *Multilevel regulation and the EU: The Interplay between Global, European and National Normative Processes*, (Martinus Nijhoff Publishers 2008), p. 332.

⁵⁷ M. Eliantonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*.

⁵⁸ Artt. 2 para. 5 and 9 para. 2 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (‘Aarhus Convention’) (1998). Also see M. Kment, *Grenzüberschreitendes Verwaltungshandeln*, (Mohr Siebeck, Tübingen 2010), p. 375-378.

⁵⁹ Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part 1) concerning Compliance by the European Union, adopted on 14.04.2011, <http://www.endseurope.com/docs/110428a.pdf> (last visited on 06.12.2011), p. 1-2.

⁶⁰ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Also see Justice and Environment: European Network of Environmental Law Organizations, *The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases* (<http://www.justiceandenvironment.org/files/file/aarhus-access-to-justice-study-2008.pdf>), p. 3.

⁶¹ To that effect also see E. Chiti & B.G. Mattarella, *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, (Springer Verlag, Heidelberg 2011), p. 370.

⁶² Ibid, and Communication to the Aarhus Convention’s Compliance Committee (2008), <http://unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf>, (last visited on 05.12.2011).

⁶³ For example: Ibid.

the General Court.⁶⁴ A case that might give an answer to that question is still pending before the General Court.⁶⁵

4. Why the Extension of the Standing Should be Supported

In the following, arguments will be brought forward to support the extension of the standing of environmental organizations.

First, environmental law is mostly laid down in legislative acts so that environmental organizations that try to bring an action before the General Court will, as a necessity, have to pass the *Plaumann* criteria.⁶⁶ In this respect, it should be noticed that the *Plaumann* criteria are not always applied in the same strict manner.⁶⁷ The case law of the European courts has shown that a stricter test concerning the standing of a plaintiff is applied in the field of environmental law than in a different field of law, such as competition law and state aid law.⁶⁸ In this context, it shall also be brought to attention that for corporations or trade unions it is considerably easier to acquire *locus standi* before the General Court than for environmental organizations.⁶⁹ As a consequence, organizations engaging in environmental law, which try to start an action under Article 263 TFEU, challenging a legislative act, are in a disadvantaged position.⁷⁰ This has led to a 'democratic deficit', since 'public participation' – a key element of a democratic society – is limited.⁷¹ According to legal scholars, Article 263 TFEU has to be teleologically interpreted and therefore it has to be assessed how the needs have developed during the time and how the needs of the European society look like at this point.⁷² Having done so, the next step would be to either adjust the upcoming case law in a way that they comply with these needs, or to change the Treaty accordingly to meet these needs.⁷³ In this regard it could be argued that Member States are in the position to protect the environment and that therefore a treaty amendment is not necessary.⁷⁴ However, it is established in the legal doctrine that NGOs are the best representatives when it comes to environmental interests because of the fact that they possess great knowledge when it comes to environmentalism.⁷⁵ Additionally, they are in an objective position.⁷⁶ This does not mean

⁶⁴ Ibid. M. Eliantonio, *Towards an ever dirtier Europe?: how the Lisbon Treaty did not improve the standing of NGOs to challenge EU environmental measures*.

⁶⁵ Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v. Commission* (pending). Also see E. Chiti & B.G. Mattarella, *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 370.

⁶⁶ A. Limante, *Actions for Annulment before ECJ after the Lisbon Treaty: has the access to justice improved?*, <http://egpa-conference2011.org/documents/PSG10/LIMANTE.pdf>, (last visited on 05.12.2011), p. 17.

⁶⁷ E. Biernat, 'The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community', *Jean Monnet Working Paper 12/03* (2003), p. 14.

⁶⁸ Ibid, p. 14. To that effect see for example Case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977] ECR 1875 and Case 730/79 *Phillip Morris Holland BV v. Commission* [1980] ECR 2671.

⁶⁹ Communication to the Aarhus Convention's Compliance Committee (2008), <http://unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf> (last visited on 5.12.2011), p. 3. Also see Ibid, p. 17.

⁷⁰ Ibid.

⁷¹ J. Wates, *Environment for Europe, NGO Keynote Address at Fourth Ministerial Conference of United Nations Economic Commission for Europe*, (1998). Also see J. Peel, 'Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization', 12 *Colo. J. Int'l Envtl. L. & Pol'y* 47 (2001), p. 48.

⁷² E. Biernat, *Jean Monnet Working Paper 12/03* (2003), p. 17.

⁷³ see Ibid.

⁷⁴ U. Haltern, *Europarecht: Dogmatik im Kontext*, (Mohr Siebeck, Tübingen 2007), p. 282.

⁷⁵ N. Haenn & R. Wilk, *The Environment in Anthropology: A reader in ecology, culture and sustainable living*, New York: New York University Press (2007), p. 46.

⁷⁶ E. BIERNAT, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, *Jean Monnet Working Paper 12/03* (2003), p. 19. Also see N. HAENN

that a NGO does not position itself on a particular issue, but that it is free from self-serving interests, as it is the case with States, which primarily concentrate on interests concerning the State.⁷⁷

4.1 Union de Pequeños Agricultores (UPA) and *Jégo-Quéré & Cie v. Commission*

It has to be mentioned here that the strict character of the Plaumann criteria is not only theoretically discussed by legal scholars.⁷⁸ Instead, the need to increase the standing of environmental organizations has not been left unheard in the European courts.⁷⁹ This is demonstrated in the cases *Union de Pequeños Agricultores (UPA)*⁸⁰ and *Jégo-Quéré & Cie v. Commission*^{81 82}.

4.1.1 Union de Pequeños Agricultores (UPA)

In the case *Union de Pequeños Agricultores (UPA)* the applicants tried to start an action before the General Court in order to annul a Council Regulation reforming the Spanish olive oil market.⁸³ In this case, Advocate-General Jacobs tried to reform the criteria necessary to proof ‘individual concern’ in an action under Article 263 TFEU.⁸⁴ In paragraph 60 of his opinion he therefore proposes that ‘*a person (should) be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests*’.⁸⁵ It is remarkable that the General Court inherited Advocate-General Jacobs’ proposal.⁸⁶ However, this progress was stopped by the Court of Justice of the European Union on appeal, which reverted to the application of the *Plaumann* criteria.⁸⁷

4.1.2 *Jégo-Quéré & Cie v. Commission*

In the case *Jégo-Quéré & Cie v. Commission* the plaintiff started proceedings before the General Court in order to seek partly annulment of Commission Regulation (EC) No.

& R. WILK, *The Environment in Anthropology: A reader in ecology, culture and sustainable living*, New York: New York University Press (2007) and A. ARNULL, *The European Union and Its Court of Justice*, Oxford EC Law Library (1999), p. 47.

⁷⁷ N. HAENN & R. WILK, *The Environment in Anthropology: A reader in ecology, culture and sustainable living*, New York: New York University Press (2007).

⁷⁸ See to that effect cases T-173/98 *Union de Pequeños Agricultores v. Commission* [1999] ECR II-3357, T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365, C-50/00 P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677 and C-263/02 P *Jégo-Quéré & Cie v. Commission* [2004] ECR I-3425.

⁷⁹ *Idem*.

⁸⁰ Cases T-173/98 *Union de Pequeños Agricultores v. Commission* [1999] ECR II-3357 and C-50/00 P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677.

⁸¹ Cases T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365 and C-263/02 P *Jégo-Quéré & Cie v. Commission* [2004] ECR I-3425.

⁸² M. ELIANTONIO & N. STRATIEVA, *From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: the locus standi of private applicants under Art. 230(4) EC through a political lens*, Maastricht Faculty of Law Working Paper 2009/13 (2009), p. 3.

⁸³ Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁸⁴ Opinion of Advocate-General Jacobs delivered on 21 March 2002 in Case UPA, paras. 59 ff. Also see E. Biernat, *Jean Monnet Working Paper 12/03* (2003), p. 35.

⁸⁵ Also A. Bodnar a.o. *The Emerging Constitutional Law of the European Union: German and Polish perspectives*, (Springer Verlag, Heidelberg 2003), p. 60.

⁸⁶ *Ibid*. Also see E. Biernat, *Jean Monnet Working Paper 12/03* (2003), p. 31.

⁸⁷ *Ibid*. Also see E. Biernat, *Jean Monnet Working Paper 12/03* (2003), p. 37.

1162/2001^{88, 89} The application of this Regulation would have had a great negative impact on the financial situation of the plaintiff.⁹⁰

Although the General Court applied the *Plaumann* criteria, it acknowledged in its judgment that the access to justice is a key element of a society.⁹¹ It further stated that the fact that the plaintiff in question has to be declared inadmissible lead to the situation that he loses his ‘right to an effective remedy’.⁹² The Court also admits that no other legal instruments could be successfully used by the applicant that would lead to an admissible action before the European courts.⁹³ The essential statement of the General Court however is to be found in paragraph 47 where it is stated that Article 263 TFEU ‘in the light of Article 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Right’ cannot be regarded anymore to secure the ‘right of an effective remedy’.⁹⁴ Furthermore, in paragraph 50, the General Court held that the *Plaumann* criteria might have to be revised.⁹⁵ On appeal, the Court of Justice of the European Union confirmed this ruling of the General Court and again applied the *Plaumann* criteria.⁹⁶

5. Why the Extension of the Standing Should be Opposed

The ratio behind the *Plaumann* criteria is to ensure that applicants are individually concerned.⁹⁷ It therefore aims to exclude the possibility for everybody to challenge EU legislation in European courts.⁹⁸ If the latter was not excluded, this could lead to the situation that EU legislation could only hardly be adopted since the group of possible plaintiffs - and as a consequence the number of admissible actions - would not be limited anymore.⁹⁹ Harding even argues that it is not on the non-privileged applicants to challenge pieces of legislation that are not addressed to them but to the EU Member States.¹⁰⁰ However, in contrast to this harsh opinion, NGOs already enjoy the possible use of legal instruments on European level in order to challenge legislative acts.¹⁰¹ According to Artt. 258 and 259 TFEU the Commission

⁸⁸ Commission Regulation (EC) No. 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d and e and associated conditions for the control of activities of fishing vessels which prohibited the use of certain fishing nets.

⁸⁹ U. Mörtz, *Soft law in governance and regulation: an interdisciplinary analysis*, (Edward Elgar Publishing Limited 2004), p. 47. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁹⁰ Ibid.

⁹¹ Case T-177/01 *Jégo-Quéré & Cie v. Commission* [2002] ECR II-2365, para. 41. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁹² Ibid, para. 43.

⁹³ Ibid, paras. 44-47.

⁹⁴ Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁹⁵ Ibid.

⁹⁶ Case C- 263/02 P *Jégo-Quéré & Cie v. Commission* [2004] ECR I-3425, para. 36. Also see Appendix 1: Detailed Analysis of the Court’s Jurisprudence (<http://live.unecce.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf>).

⁹⁷ S.D. Phillips & S. Rathgeb Smith, *Governance and Regulation in the Third Sector: International Perspectives*, p. 176. Also see E. Kirk, *EU law*, p. 50.

⁹⁸ E. Kirk, *EU law*, p. 50.

⁹⁹ Ibid.

¹⁰⁰ C. HARDING, ‘The Private Interest in Challenging Community Action’, 5 *ELRev.* (1980), p.354. Also see E. Biernat, *Jean Monnet Working Paper 12/03* (2003), p. 17.

¹⁰¹ A. Limante, *Actions for Annulment before ECJ after the Lisbon Treaty: has the access to justice improved?*, p. 17; P. Sands, ‘European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection’, 100 *Yale L.J.* 2511 (1991). Also see J. Peel, 12 *Colo. J. Int’l Env’tl. L. & Pol’y* 47 (2001), p. 49.

or Member States can start proceedings against another Member State for not complying with environmental law before the Court of Justice of the European Union on behalf of a request of a NGO.¹⁰² A different possibility, where NGOs do not depend on either the Commission or a Member State, is to start an action before a national court, if that Member State recognizes the standing of a NGO.¹⁰³

Last, the Lisbon Treaty has introduced reforms to the prior system of Article 263 TFEU.¹⁰⁴ Although these reforms did not have an impact on the *Plaumann* criteria itself, they had the consequence that the possibility for non-privileged applicants under that article were increased by creating the possibility to challenge regulatory acts, in case of which ‘individual concern’ does not have to be proven.¹⁰⁵

6. Conclusion

Legal scholars agree on the circumstance that the *Plaumann* criteria form a barrier between non-privileged applicants and their access to the European courts. When it comes to the question whether - and in case that question has to be answered in the affirmative – how it has to be resolved, such a consensus is absent. Different ways of solving the issue have been discussed in the course of this paper.

What is remarkable, is the circumstance that neither the General Court nor the Court of Justice of the European Union has until now acknowledged ‘individual concern’ in a case where an environmental NGO acted as plaintiff in a proceeding concerning the challenge of a legislative act. However, in this context, it has to be recalled that the General Court in the cases *Jégo-Quéré & Cie v. Commission* and *Union de Pequenos Agricultores (UPA)* (and also Advocate-General Jacobs in the latter case) elaborated on the effects of the system of Article 263 TFEU on non-privileged applicants and proposed that this system should be revised. Although these legal developments were not accepted by the Court of Justice of the European Union until now, they still serve as a demonstration for the growing awareness of the consequences of the strict application of the *Plaumann* criteria – especially on the side of the European judicial power. The call for an extension of the standing of environmental organizations therefore does not only reflect the opinion of a minority, but instead of a growing majority. The *Plaumann* criteria, as they are interpreted until now, can be considered to breach the fundamental right of access to justice on EU level. In case the legislation in question qualifies as legislative act which is not addressed to the plaintiff, other independent legal instruments are not available for non-privileged plaintiffs to challenge the act. The only remaining possibilities are to address either the Commission or a Member State to start proceedings before the Court of justice of the European Union or to try to challenge the act on national level, if that Member State’s legal system provides for such an opportunity. Although valid reasons can be adduced to oppose an extension and to remain the application of the *Plaumann* criteria instead, these arguments cannot ace the supporting arguments any longer.

¹⁰² Artt. 258 and 259 TFEU. Also see K. Lenaerts & J. A. Gutierrez-Fons, ‘The General System of EU Environmental Law Enforcement’, *Yearbook of European Law* (2011).

¹⁰³ J. Peel, 12 *Colo. J. Int’l Envtl. L. & Pol’y* 47 (2001), p. 49.

¹⁰⁴ A. Arnall, ‘From Bit Part to Starring Role ? The Court of Justice and Europe’s Constitutional Treaty’, 24 *Yearbook of European Law* (2005), p.1-25. Also see M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, 45 *CMLRev* (2008), p. 613-703 and R. Barents, ‘The Court of Justice after the Treaty of Lisbon’, 47 *CMLRev* (2010), p. 709-728.

¹⁰⁵ A. Limante, *Actions for Annulment before ECJ after the Lisbon Treaty: has the access to justice improved?*, p. 17.

To sum up, the conclusion has to be drawn in the light of the jurisprudence of the General Court and the legal doctrine in the field of the standing of environmental organizations that this standing should be extended to meet the needs of the European society.

STATE LIABILITY FOR JUDICIAL BREACHES OF UNION LAW: LOOSENING THE KÖBLER CRITERIA?

Mayke Knoben

1. Introduction

In 2003 it was held in the *Köbler* judgment by the Court of Justice of the European Union that it is possible to have state liability for judicial breaches of Union law. The Court confirmed this view in *Traghetti del Mediterraneo*. The existence of state liability was in both cases made subject to the same test. This test, as laid down in paragraph 51 of the *Köbler* judgment, contains three criteria. First, ‘the rule of law infringed must be intended to confer rights on individuals’. Second, ‘the breach must be sufficiently serious’. Third, there must be ‘a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties’. As an adaptation to the specific judicial context, the Court held that a breach will only be sufficiently serious when there is a manifest infringement.

There has been a lot of critique on this test. Member States made complaints at the Court while *Köbler* was pending because they were against the concept of state liability for judicial breaches of Union law. Academics on the other hand criticized the test for being unclear and too strict to provide for an effective remedy. It should therefore be examined if a better test is available. One way of doing so might be to loosen the *Köbler* criteria. This is what will be researched in this paper: Do the *Köbler* criteria have to be loosened? To answer this question I will look at case law of the European Union and the perspective of Member States on the concept on general. The most attention will however be spend on a comparative analysis of the critiques academics gave on the *Köbler* test.

To answer the main question, there must be taken a look first at what the current framework for state liability, especially in the field of judicial breaches, is. Since this paper is not focused on the framework, only the main rules of each case will be given. In the second part of the paper the critique on the concept of state liability for judicial breaches will be taken into account. Later on in this part, the Court’s response to this critique will be shown, next to the aspect if the Court’s answer is really that sufficient. The relevance of this part lies in the fact that it shows how delicate the balance between national interests and Union law is. In the third part critique on the *Köbler* test made by academics will be given. This critique shows both positive and negative parts on the test. This critique will finally be used in the fourth part to explain why a new criterion must be established.

For practical reasons I will consistently refer to Union law and the Court of Justice of the European Union, even on places where the terms Community law and the European Court of Justice were used in the past.

2. The Framework of State Liability of Judicial Breaches of Union Law

State liability, the concept where Member States can be hold judicially accountable for infringements in Community law, was a no-go option for a long period of time. In fact, in 1991 EU Member States held explicitly at an intergovernmental conference that they refused to accept the concept of state liability for infringements of Community law.¹ The conference

¹ Tallberg, ‘Supranational influence in EU enforcement: the ECJ and the principle of state liability’, 7 *Journal of European Public Policy* 1 (2000), p. 109.

however did not stop the now-called Court of Justice of the European Union (hereinafter: CJEU) to adopt this concept.

The CJEU accepted state liability for judicial breaches of Union law for the first time in the case *Francovich*.² In this case the CJEU held that state liability is possible when there is a piece of Union legislation that confers rights to individuals. Second, the content of these rights must be identified by provisions of this legislation. Finally, there must be a causal link between the breach of the obligation and the damage suffered by the parties.³ If state liability exists, the injured party must be awarded damages.

After the CJEU held *Francovich*, there was a lot of confusion all around Europe on how to deal with this new concept.⁴ In *Brasserie du Pêcheur*, the CJEU took the opportunity to clarify what it held state liability should mean. First, it held that Member States are responsible for making good damage that is caused to individuals by the state because national legislation is in breach with Union law.⁵ Second, it held that the margin of discretion should be taken into account. If there was a wide margin for Member States, state liability should only exist when three conditions have been met. These criteria are the same as in *Francovich*; only the second criterion has changed. This is now that the breach must be sufficiently serious.⁶ Hereby, the CJEU gave different factors that should be taken into account. Third, the CJEU held that national legislation on state liability can also be applied in national proceedings, but only when this legislation is not stricter than the European test. It should not be a fault-based test either.⁷ Finally, the CJEU held that a breach can be sufficiently serious even when the CJEU had not ruled on the specific issue before.⁸

In *Köbler*⁹ the CJEU held that state liability is possible for judicial breaches of Union law as well. The Court thereby stated that the same criteria as in *Brasserie du Pêcheur* have to be used. A sufficiently serious breach will be achieved when there is a manifest infringement of Union law. This is a stricter test, since the judiciary needs a wider margin of discretion to function effectively.¹⁰ For a manifest infringement the CJEU gives a list of factors that have to be taken into account: ‘the degree of clarity and precision of the rule infringed; whether the infringement was intentional; whether the error of law was excusable or inexcusable; the position, where taken, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of article 234 EC.’¹¹ These factors are the same as in *Brasserie du Pêcheur* except for the addition of the factor of the preliminary question in *Köbler*.

In *Traghetti del Mediterraneo*¹² the CJEU confirmed *Köbler*. It held that the latter has to be followed by Member States in creating state liability for judicial breaches of Union law. Furthermore, the CJEU held that Member States cannot create criteria that are stricter than the criteria that are mentioned in *Köbler*. Stricter criteria would make *Köbler* basically useless since they would make it practically almost impossible for a claimant to be awarded damages. That is not what the CJEU wanted when it adopted the concept for judicial breaches.¹³

² Case 6/90 & 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5537.

³ Paragraph 40 Case 6/90 & 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5537.

⁴ Tallberg, 7 *Journal of European Public Policy* 1 (2000), p. 110.

⁵ Case 46/93 & 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, paragraph 36.

⁶ Case 46/93 & 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, paragraphs 51 and 74.

⁷ Case 46/93 & 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, paragraph 83.

⁸ Ibid, paragraph 93.

⁹ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239.

¹⁰ Garde, ‘Member states’ liability for judicial acts or omissions: much ado about nothing?’, 63 *Cambridge Law Journal* 3 (2004), p. 565.

¹¹ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 55.

¹² Case 173/03 *Traghetti del Mediterraneo v. Italy* [2006] ECR I-5177.

¹³ Case 173/03 *Traghetti del Mediterraneo v. Italy* [2006] ECR I-5177, paragraph 40.

In the final case that will be discussed in this paper, *Commission v. Spain*¹⁴, the CJEU declared for the first time that a Member State was in breach of Union law, solely based on the Spanish supreme court's decision. Normally a judicial breach will have some legislative aspect or an aspect of misinterpretation of Union law. This time there was a pure judicial infringement that was not based on such factors.¹⁵ The CJEU thus extended the possibility to have state liability for breaches of the national judiciary.

What is shown by this case law is that the concept of state liability has extended over time. The state can now also be held liable for breaches of Union law made by the judiciary. However, this test is stricter since a sufficiently serious breach will only exist when there is a manifest infringement of Union law. This test should not be made stricter as was tried by the Italian authorities in *Traghetti*. Finally, the CJEU also made it possible to create state liability that is solely based on a judicial infringement of Union law.

3. A Critical View on the Concept of State Liability for Judicial Breaches of Union Law

3.1 Criticism on the Concept

As already stated, Member States did not want to create a separate system of state liability for breaches of Union law.¹⁶ The Member States had several reasons for this. These were expressed to the CJEU when *Köbler* was pending. The grounds of objection were based on the principles of *res judicata* and legal certainty, independence of the national judges, impartiality of national courts and the parallel between the national rules and Union rules.¹⁷

Member States argued in *Köbler* that accepting state liability would mean that *res judicata* would not be respected. Via this concept it would namely be possible to challenge a decision that was held by the national supreme court, a court whose decisions normally cannot be challenged.¹⁸ This would of necessity lead to legal uncertainty as well: the authority of a decision is unclear until the claimant decides not to challenge it.

Member States argued that creating state liability for judicial breaches of Union law would affect the independence of the national judiciary as well. This is because it would make it possible to penalize the judicial power for its decisions. Penalizing the judicial power could then have effects on how the judicial power will decide on disputes in the future. Furthermore, the independence of the national judicial power will be inflicted by the legislative power. The legislative power will be responsible for making the penalty framework, a responsibility Member States must be, considering the division of powers, very careful about. Afraid of a ruling of the CJEU expanding state liability, the Member States held in *Köbler* that state liability for judicial breaches should stay a domestic matter.¹⁹

The third argument Member States posed was that state liability for judicial breaches would infringe the impartiality of national courts. The test for impartiality is subject to objective and subjective criteria and closely related to article 6 of the European Convention of Human Rights (hereinafter: ECHR).²⁰ Especially the objective criterion will be in play; It is not unlikely that the same court will judge on both the initial proceedings and on the claim for damages, especially in appeal. Garde warned that as a result of this, a claim for state liability

¹⁴ Case 154/08 *Commission v. Spain* [2009] not yet reported.

¹⁵ López Escudero, 'Case C-154/08, *Commission v. Spain*, Judgment of the Court (Third Chamber) of 12 November 2009, not yet reported', 48 *Common Market Law Review* 1 (2011), p. 227.

¹⁶ Tallberg, 7 *Journal of European Public Policy* 1 (2000), p. 109.

¹⁷ Opinion A-G Léger, Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 87.

¹⁸ P. Craig & G. de Búrca, *EU law – Text cases and Materials* (Oxford University Press, 2011, 5th edition), p. 350-351.

¹⁹ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraphs 22 & 24.

²⁰ ECtHR, *Haushildt v. Denmark* (10486/83) [1989] 12 EHRR 266.

can go up to the national supreme court, the same court that is claimed to have infringed Union law.²¹ It will be hard to call such a proceeding independent and in line with the ECHR. This opinion is shared by Cabral and Chaves.²²

Finally, Member States argued that accepting state liability for judicial breaches would create a parallel between national rules and Union rules. They held that national rules on state liability for judicial infringements already exist in several Member States. Therefore there would be no need to adopt a new system custom-made for breaches of Union law.²³

3.2 Adopting the Concept

Despite the fact that Member States were reluctant towards the adoption of state liability for judicial breaches of Union law, the CJEU held that such a concept should be adopted anyway. The main reason why the CJEU did this was already stated in *Francovich*: if an individual would not have the possibility to get redress because the state acted in breach of Union law, Union law would no longer be effective nor would it be able to create rights for individuals.²⁴

Such a thing is even true for judicial breaches. In *Köbler* the CJEU held once again that state liability is ‘inherent in the system of the Treaty’ and that ‘that principle applies ... whichever is the authority of the Member State whose act or omission was responsible for the breach’.²⁵ Here the CJEU shows once again that Union law and Union case law is supreme over national law. Member States have to comply with Union law whether they like it or not. According to Albors-Llorens, state liability can be seen as ‘the ultimate indirect mechanism to secure Member States’ compliance with their Community obligations’.²⁶

State liability however should not be unlimited. It is important for the existence of state liability that the claimant has been deprived of rights which Union law confers to individuals. For judicial state liability, it needs to be pointed out that a claimant normally can appeal against a judicial decision. In those cases there will not be a deprivation of rights. There is only such deprivation when a court against whose decision cannot be appealed holds a decision in breach of Union law. The CJEU held in *Köbler* that only for those situations the concept of state liability can be used.²⁷ This limitation is clear because a claimant should always use an effective judicial remedy. Suing the state after a judgment in first instance is not effective since it would deprive the judiciary to correct its own mistake.

When it adopted a somewhat limited concept of state liability, the CJEU took the criticism of Member States in account as well. On the argument of *res judicata* the CJEU held that a claim for damages is a new case and does not of necessity have the same purpose or involve the same parties as the proceedings that lead to the decision that is now indirectly challenged. Therefore the authority of this decision is not challenged. So, the CJEU did not agree with the Member States on the argument of *res judicata* and legal certainty.²⁸ The reasoning of the CJEU is logical as it clearly states that the initial proceedings and the proceedings for damages are two different proceedings and thus *res judicata* and legal certainty are not endangered.

On the second argument, the independence of the judiciary, the CJEU held that this is not affected. Not the personal liability of the judge who held the decision is at stake, it is the

²¹ Garde, 63 *Cambridge Law Journal* 03 (2004), p. 566-567.

²² Cabral & Chaves, ‘Member state liability for decisions of national courts adjudicating at last instance’, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 118.

²³ Opinion A-G Léger, Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraphs 92-93.

²⁴ Case 6/90 & 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5537, paragraph 33.

²⁵ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraphs 30-31.

²⁶ Albors-Llorens, ‘The principle of state liability in EC law and the supreme courts of the member states’, 66 *Cambridge Law Journal* 02 (2007), p. 273.

²⁷ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 34.

²⁸ *Ibid*, paragraphs 39-40.

liability of the state. On the argument that accepting state liability might have an influence on the way judges will make decisions, the CJEU held that accepting state liability will enhance the quality of decisions and on the long-term the authority of decisions.²⁹ As an additional comment, it has to be said that it is up to the Member States to make a precise legislation on state liability for judicial breaches and therefore Member States can create safeguards for the independence of judges. They only should take the comments of the CJEU into account by doing so.

On the third argument, the impartiality of the judiciary, the CJEU looked mostly at the issue raised that there are no special courts for reparation in the Member States. The CJEU held that the absence of such a court cannot be a reason for not adopting state liability. The designation of a competent court and establishing procedural rules must be done by the Member States.³⁰ On the one hand it is reasonable that the Court refused to give precise indications. This is technically complicated and would perhaps interfere too much with the sovereignty of the Member States. However, Cabral and Chaves held that the CJEU could have given more indications on how it would like to see the protection of impartiality to be filled in. Hereby the CJEU could have taken a look at article 6 ECHR and the interpretation of that article by the European Court of Human Rights. By not doing so Cabral and Chaves think the CJEU missed an opportunity.³¹

The CJEU held on the final argument, the parallel between national law and Union law, that there already is a parallel for reparation between the European Court of Human Rights and national courts.³² From this it can be derived that the Member States have accepted the idea that an external court that can make binding decisions on reparation for national courts. The concept of state liability for judicial breaches of law that is not national law is thus not that strange as Member States were claiming in *Köbler*.

4. A Critical View on the Köbler Criteria

4.1 Positive Critique on Köbler

The first thing that has to be said is that Member States were reluctant in adopting the concept of state liability. It is because of that the CJEU could not go too far in establishing liability for judicial breaches of Union law – it would interfere with national interests. However, a concept of liability was necessary to prevent that Union law would lose its value. The CJEU thus had to create a balance between national interests and Union law. According to Drake, this balance is very hard to make, especially since Member States are not willing to hand in more ‘sovereignty’. The CJEU cannot create a full and complete remedy, but only an effective one as long as the Member States are unwilling to cooperate.³³ Thus, Drake implies that the system as it is now is not perfect. However, creating criteria that would loosen *Köbler* would interfere with national interests, something Member States are very reluctant about.

Second, Breuer holds the balance between Union law and legal certainty as laid down in *Köbler* is preserved. Breuer believes that Union law does need protection. However, such protection should not be unlimited since this would create legal uncertainty. Breuer disagrees with the CJEU and believes legal certainty plays a role in the field of state liability. He thinks that the current test is in conformity with the other remedies individuals may seek for

²⁹ Ibid, paragraphs 42-43.

³⁰ Ibid, paragraphs 44-47.

³¹ Cabral & Chaves, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 118.

³² Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 49.

³³ Drake, ‘Scope of courage and the principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, 31 *European Law Review* 6 (2006), p. 862.

reparation for judicial breaches. Such remedies are the national laws on state liability and the European Court of Human Rights.³⁴ Therefore the current *Köbler* criteria preserve legal certainty: the outcome of a claim for state liability under Union law will normally be the same as under other fields of law.

As already stated in the previous argument, the *Köbler* criteria are in line with the national standards on state liability for judicial breaches. Most Member States do not have a system for state liability or allow it only under very strict circumstances.³⁵ The CJEU held that state liability for judicial breaches should be very exceptional and thus strict criteria are needed as well.³⁶ Loosening the criteria would be in opposite of what most Member States are doing via their national laws.³⁷

Anagnostaras adds in favour of the current set of criteria that these serve the principle of effectiveness, the practical implications such as costs of legal proceedings. The reason for this is that creating protection for individuals against judicial breaches of national supreme courts is necessary. The remedy of starting a new procedure for reparation as is favoured by the CJEU is the most effective since other alternatives could involve the change of the national judicial procedural system.³⁸ However, Anagnostaras adds a critical note to his opinion. He believes that the principle of effectiveness is only served when state liability when solely courts of final instance can be held liable. For poor decisions of ordinary courts the appeal procedure will be much more effective.³⁹

According to Dougan, the *Köbler* criteria can create more supremacy for the CJEU over national courts. This is because these criteria will force national courts, at least national supreme courts, to think twice before deciding not to fulfil their obligation to disapply national law in favour of Union law. A serious infringement of this obligation can now lead to non-contractual liability. It is to be expected that national courts are willing to avoid this consequence and therefore are more willing to comply with the CJEU's case law as well.⁴⁰

The final aspect scholars hold to be in favour of *Köbler* is that it forces national supreme courts to send preliminary questions when the pending case cannot be resolved via *CILFIT*.⁴¹ In this case, the CJEU held that the obligation to refer preliminary questions does not exist when the *acte clair* doctrine comes in play. Before *Köbler* national courts were much more likely to state that this doctrine was applicable, even without giving thorough reasons for that.⁴² National courts now have two options, otherwise it becomes likely that a manifest infringement is created. The first option is to send a preliminary question to the ECJ. The second option is to make such a thorough reasoning that the fact that the court did not send a preliminary question cannot create a manifest infringement of the claimant's rights. One way or another, the quality of the national judiciary will be guaranteed.⁴³

4.2 Negative Critique on Köbler

Apart from the positive aspects of *Köbler*, there were also serious points of critique. First, it is held that the *Köbler* criteria are too complex and therefore can weaken the individual's

³⁴ Breuer, 'State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria', 29 *European Law Review* 2 (2004), p. 250-254.

³⁵ Breuer, 29 *European Law Review* 2 (2004), p. 250.

³⁶ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 53.

³⁷ Cabral & Chaves, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 115-116.

³⁸ Anagnostaras, 'Erroneous judgments and the prospect of damages: the scope of the principle of governmental liability for judicial breaches', 31 *European Law Review* 5 (2006), p. 740.

³⁹ Anagnostaras, 31 *European Law Review* 5 (2006), p. 742-743.

⁴⁰ M. Dougan, *National remedies before the Court of Justice* (Hart Publishing, 2004), p. 250-251.

⁴¹ Case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 341.

⁴² Dougan, *National remedies before the Court of Justice*, p. 250-251.

⁴³ Cabral & Chaves, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 121-122.

effective protection. Second, it is held that the current set of criteria and factors that have to be taken into account are too unclear, especially when is referred to the consequences of not sending preliminary questions. Finally, it could be stated that although the CJEU created state liability *de jure*, it can be challenged if such liability has really been created *de facto*. Some believe that the current criteria are too strict and that the CJEU has set the bar too low for the national courts.

Drake believes that the current system of state liability of judicial breaches is too complex. Hereby is referred to the fact that the CJEU did not create a complete and uniform system. Although being aware of the fact that the position of the Member States withholds the CJEU from creating such a system, Drake still feels that it would have been better if the CJEU would have mentioned more rules that would harmonize state liability across the Member States.⁴⁴ Harmonization would have created more clarity. This will make it much likelier that national courts will be able to protect the right of reparation for claimants effectively.

A point of criticism is that the current set of criteria is quite unclear. Hereby most criticism is given on the second criterion, the sufficiently serious breach. The CJEU has given an entire list of factors that should be taken into account. It is unclear though what weight should be given to each criterion. Advocate General Léger holds in *Traghetti* that the factor of the (in)excusable error should be given the most weight, next to the obligation of sending preliminary questions to the CJEU by supreme courts.⁴⁵ However, the CJEU itself says nothing about this. This is also the case on the factor of the preliminary question. The Advocate-General held that not referring a question to the CJEU alone is insufficient to create state liability.⁴⁶ The CJEU again did not give a direct response on this and referred to *CILFIT*. Murphy however believes that *CILFIT* itself needs clarification to make it unlikelier that state liability will be created on that aspect.⁴⁷ Cabral and Chaves on the other hand hold that the CJEU should give more clarity on what it holds to be the relationship between not referring a preliminary question and the existence of a manifest breach.⁴⁸

It can be stated that the CJEU has set the bar too high for claimants to be awarded damages for state liability. The criteria are very strict and claimants have had little to no success in proceedings for damages across the Member States in the past.⁴⁹ In combination with the criteria being unclear it could be relatively easy for national courts to dismiss a claimant's arguments on the basis of a not very thorough decision. Furthermore, when national courts refer a preliminary question to the CJEU, it is likely that the CJEU will agree with the national court. This might sound as a bold statement, but Beutler believes that the CJEU indeed has set the bar for courts very low. Only complete breaches of Union law will be considered to be a manifest infringement.⁵⁰ According to Cabral and Chaves, the CJEU goes even so far that on that point the interests of the claimant will of necessity come on the second place.⁵¹

⁴⁴ Drake, 31 *European Law Review* 6 (2006), p. 862.

⁴⁵ Opinion A-G Léger, Case 173/03 *Traghetti del Mediterraneo v. Italy* [2006] ECR I-5177, paragraph 70-72.

⁴⁶ Opinion A-G Léger, Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 147.

⁴⁷ Murphy, 'An effective right to cross-border healthcare? On patients, primacy and procedural autonomy: comment on Elchinov', 36 *European Law Review* 4 (2011), p. 549.

⁴⁸ Cabral & Chaves, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 121-122.

⁴⁹ Beutler, 'State liability for breaches of community law by national courts: Is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?', 46 *Common Market Law Review* 3 (2009), p. 787-793.

⁵⁰ Beutler, 46 *Common Market Law Review* 3 (2009), p. 781.

⁵¹ Cabral & Chaves, 13 *Maastricht Journal for European and Comparative Law*, 1 (2006), p. 123-124.

5. *Loosening the Köbler Criteria?*

The current criteria have got both positive and negative aspects. The current system is far from perfect considering the serious negative criticisms on it. In my opinion the *Köbler* criteria should be loosened. Hereby I believe that a new second criterion must be established. This will be, following Advocate General Léger in his opinion on *Köbler*, that a sufficiently serious breach will be established when the error made by the supreme court is inexcusable.⁵² The main reason that this criterion should be adopted is that it has got the merit of simplicity.⁵³ Many problems with the current test are based on the fact that the current criteria are so unclear. That will make it more likely that national courts send more preliminary questions to the CJEU. This has got as consequences that it will create a bigger workload for the CJEU and makes the time a case will be pending on a national level much longer. This would decrease the effectiveness of the national judiciary. On the other hand, if national courts decide not to send a preliminary question, it is very unlikely that these courts will give decisions that are thorough and clear in a way that the judgment will be accepted by the claimant.

The second reason is that national courts are very strict in applying the criteria. Therefore it is extremely unlikely that claimants will have success in proceedings for damages. This implies that state liability for judicial breaches would no longer be a real effective remedy. Supreme courts will namely not be stimulated to enhance the thoroughness and the quality of their decisions when they know that lower courts tend to set aside Union law in favour of the case law of the national supreme court.

The third reason is that the CJEU at this very moment has set the bar too low for national courts. Even when national supreme courts have made very serious mistakes, the CJEU still tends to state that there has not been a manifest infringement. This is what, according to Cabral and Chaves,⁵⁴ happened in *Köbler*. This should be taken very seriously. The CJEU held in *Köbler* that state liability was meant to enhance the quality of decision-making by the national judiciary as well.⁵⁵ However, the CJEU does not show this at the moment by the way it is acting.

It should be stated that the CJEU is right on the issue that state liability should only be in play for decisions of national supreme courts. This is mainly based on the principle of effectiveness. For lower courts the most effective way to challenge a decision is to appeal. Since such an option is not available for a decision of a supreme court, an alternative remedy has to be created. This alternative remedy should be state liability. It will relatively spoken be the most efficient remedy in both costs and time.

Of course it is important that the *Köbler* criteria should not be too loosened too much. That is because there is a fine balance between the national interests and Union law. National interests will however not be inflicted too much when a new criterion is created. What the CJEU needs to do to prevent that national interests will be inflicted too much is to give a strict – although not that strict as it is nowadays- interpretation of when an error will be inexcusable. The CJEU should be held capable of doing so since making a balance between Union law and national interests is something it has done for quite some time.

6. *Conclusion*

As was shown by the second part of this paper, there is a delicate balance between national interests and Union law. The CJEU therefore should be very careful in not going too far in

⁵² Opinion A-G Léger, Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paragraph 139.

⁵³ Dougan, *National remedies before the Court of Justice*, p. 246.

⁵⁴ Cabral & Chaves, *13 Maastricht Journal for European and Comparative Law*, 1 (2006), p. 121-122.

⁵⁵ Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, Paragraph 43.

creating state liability. However, the fine balance will still be preserved when the new criterion would be adapted since the CJEU can give a restrictive – yet not too restrictive – view on what it considers to be inexcusable.

On the other points of critique stated by the Member States, it can be held that the CJEU for the most part has given a sufficient answer on these concerns. For the concern of impartiality the CJEU has given a too simplistic answer. It would have been better if the CJEU complied with the rules on impartiality as laid down by the European Court of Human Rights.

In the third part it was shown that there are both positive and negative aspects on *Köbler*. Positive aspects were that the delicate balance between the national interests and Union law has been preserved and that this is also applicable for the relationship between Union law and legal certainty. Furthermore, the system is in line with Member States' legislation on state liability for judicial breaches and it is an effective system. The *Köbler* criteria create more supremacy for the CJEU over national courts and more willingness on the hand of national courts to comply with Union law.

Negative aspects on the *Köbler* criteria were the system is too complex and therefore can weaken the individual's effective protection. Furthermore, the criteria are too unclear to create proper rulings on a national level on liability. Finally, the CJEU did not create an actual remedy to challenge state liability *de facto*.

To tackle these concerns, the *Köbler* criteria must be loosened somewhat. A good way of doing so is by creating the criterion that a breach is sufficiently serious when a national supreme court has made an inexcusable error. Reasons for that are that this test gives more clarity and therefore in the end will enhance the effectiveness of the national judiciary. Furthermore it will enhance the legal quality of decisions since national courts now shall act more carefully and thoroughly on proceedings. If they do not, the chance that their decisions will create liability will be greater.

The new approach does not mean that the 'old' approach should be thrown overboard. The CJEU still must be careful on keeping a balance between national interests and Union law. Therefore the new test must be interpreted in a relatively strict manner. Furthermore, state liability should only be possible for decisions of supreme courts since only then it is effective to have such a concept in play.

PROTOCOL 30: DO EU FUNDAMENTAL RIGHTS HAVE A DIFFERENT MEANING IN THE UK, POLAND AND THE CZECH REPUBLIC?

Allison Bilka

1. Introduction

The 1957 Treaty that established the European Economic Community was silent on the protection of fundamental rights and had as the main purpose economic integration and a common market.¹ Forty-three years after the establishment of the Community, the Charter of Fundamental Rights of the European Union was solemnly proclaimed by the Commission, the European Parliament and the Council of the EU at Nice on 7 December 2000.² Ten years after the proclamation by EU institutions, the Charter has been incorporated into European law and given legal force by the Treaty of Lisbon, and is now a catalogue of social, political and civil rights with legally binding force.³ The process of drafting the Charter as well as the proposed incorporation of it by the Lisbon Treaty has been marked by dissenting opinions expressed by some of the Member States. The UK insisted upon a Protocol to the Lisbon Treaty in order to clarify certain aspects of the application of the Charter. This idea attracted Poland and eventually resulted in a Protocol⁴ being attached to the Lisbon Treaties⁵. The Czech Republic signed a last-minute agreement in October 2009 to join the Protocol at the conclusion of the next Accession Treaty.⁶

In this essay the role and importance of the Protocol will be discussed. The topic of the paper is formulated as a question and hence directed my research: 'Do EU Fundamental Rights Have a Different Meaning in the UK, Poland and the Czech Republic?'

In this paper I am going to examine if and (if answered affirmative) to what extent the application of the Charter is different in the UK and Poland than in the other Member States due to the existence of the Protocol. In my attempt to answer the question, I will use both primary and secondary legislation, and look not only at the legal but also historical and political perspective.

Firstly, I will discuss the origins and content of the Charter and its effect after the Lisbon Treaty. Next, the scope of fundamental rights will be discussed. Then, I will provide an assessment of the origins, content and effect of the Protocol No 30. The paper will end with a conclusion answering my research question.

¹ X. Groussot *et al*, 'Fundamental Rights Protection in the European Union post Lisbon Treaty', 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 1.

² J. Wouters, 'The EU Charter of Fundamental Rights. Some reflections on its external dimension', *Maastricht Journal of European and Comparative Law* 1 (2001), p. 2.

³ D. Anderson *et al*, 'The Charter of Fundamental Rights: History and Prospects in post-Lisbon Europe', *European University Institute, EUI Working Papers* 8 (2011), p. 1.

⁴ C 306/156 [2007] Protocol No. 30 on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom.

⁵ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 10.

⁶ Groussot *et al*, 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 8.

2. *Origins of the Charter*

As early as 1969, the fundamental rights were held by the European Court of Justice to be enshrined in the general principles of Community law and protected by the Court⁷. From that year onwards, the Court had regularly interpreted the EC measures in the light of fundamental rights⁸ and often drew its inspiration from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹ However, there was still no codified declaration of rights of the Community. Some argued that the Union should accede the ECHR but the ECJ held in its 2/94 Opinion in 1996 that such a change would have to involve a revision of the founding Treaties.¹⁰ As unanimity for such an amendment of the Treaties did not exist, the German Presidency of the EU proposed, in June 1999, a Charter of Fundamental Rights.¹¹ Through decisions taken during a meeting in Cologne in 1999, the European Council set a process of drafting the Charter and a Convention was set up for that purpose. It was not decided however, what the legal status of the Charter would be, and that was supposed to be agreed on at a later date.¹²

Reasons to set up the Charter varied from considering it a political statement to hopes of its incorporation into the Treaties.¹³ The European Commission and the Parliament opted for greater significance of the document whereas the Member States were rather in favour of a declaratory act. In the end, the Charter appeared in a form of mere 'solemn proclamation' that took place at Nice on 7 December 2000. This meant that the Charter, at least for the time being, took form of political declaration and was deprived of legally binding force.¹⁴

3. *Change of Status*

Although not legally binding, the Charter was found by the Court's judges to be a useful point of reference in explaining legal interpretations¹⁵. It hence acted as a form of soft law and was 'a material legal source, shedding light on the fundamental rights which are protected by the Community'.¹⁶ The attempts to change the legal status of the Charter started in 2004, and the Laeken Declaration provided that a Convention on the Future of Europe should consider whether the Charter ought to be included in the basic treaty.¹⁷ As a result, a Convention Working Group II (that consisted of the same members as those who worked on the drafting of the Charter) was assigned a task to consider how such incorporation could take place and what its implications would be.¹⁸ The Convention's report proposed incorporation of the Charter in such a way that would make it legally binding and give it a constitutional status. As a result of the report, the Charter became Part II of the 2004 Constitutional Treaty.¹⁹

⁷ Case 29/69 *Stauder v. Ulm* [1969] ECR 419, Para. 7.

⁸ K. Lenaerts *et al*, 'The Charter and the Role of European Courts', *Maastricht Journal of European and Comparative Law* 1 (2001), p. 91.

⁹ *Ibid.* The ECHR came into existence within the Council of Europe and entered into force in 1953. It protects every person, regardless of their nationality and place of residence that comes under the jurisdiction of a contracting party.

¹⁰ Groussot *et al*, 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 1.

¹¹ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 1.

¹² B. de Witte, 'The Legal status of the Charter: Vital Question or Non-Issue?', *Maastricht Journal of European and Comparative Law* 1 (2001), p. 81.

¹³ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 1.

¹⁴ B. de Witte, *Maastricht Journal of European and Comparative Law* 1 (2001), p. 82.

¹⁵ Groussot *et al*, 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 2.

¹⁶ Case C-540/03, *European Parliament v Council of the European Union*, Para. 108.

¹⁷ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 3.

¹⁸ *Ibid.*

¹⁹ Groussot *et al*, 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 2.

However, the Dutch and French rejection of the Constitutional Treaty brought to an end any hopes of its ratification and hence also the incorporation of the Charter. The Treaty had to be modified and, as part of the process, the Charter was removed from the text of the Treaty. Instead of incorporation, cross-reference was applied in Article 6(1) of the revised Treaty. The reference was made to the text of re-proclaimed Charter as signed by the Presidents of the Council, the Commission and the European Parliament on 12 December 2007 in Strasbourg, on the eve of the signing of the Lisbon Treaty.²⁰

With a successful ratification of the Lisbon Treaty, the Charter became a part of the Union's 'primary' rules by virtue of the aforementioned Article 6(1) TEU declaring that the Charter 'shall have the same legal value as the Treaties'. Therefore, the fact that the Charter did not become incorporated into the substantive text of the Treaties had no legal significance.²¹

4. *The Charter- Structure and Content*

The Charter is clearly structured and consists of seven Chapters dedicated to following themes: Dignity, Freedoms, Equality, Solidarity, Citizens' rights, and Justice. Chapter VI contains general provisions. It seems that the Charter follows distinctions familiar from many legal doctrines: between procedural and substantive, economic and cultural, individual and citizens' rights, etc. However, issues have been raised regarding nature of the Charter as a human rights document since some of the provisions, e.g. Article 36, are not clearly related to human rights and have purely economic nature. Another example could be Article 43, which provides the right to refer to the European Ombudsman, a right that traditionally is not considered to be within the scope human rights provision and is moreover already included in the text of the Treaties.²²

5. *Fundamental Rights*

Fundamental rights, in the meaning of the Charter, are contained in Articles 1-50 of the document and, in the Charter's preamble, are referred to as 'rights, freedoms and principles'. The sources of fundamental rights can be tracked in the 'explanations'²³ and include, *inter alia*, national constitutions, the ECHR, the European Social Charter, the Community Charter on the Fundamental Social Rights of Workers and the EC and EU Treaties but also the New York Convention on the Rights of the Child.²⁴

The term 'fundamental rights' was intended to be all-encompassing and includes not only the classic protection from the State's interference but also some rights specific for economic, social and political life of the Union's citizens. The origins of the term 'fundamental rights' as

²⁰ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 3.

²¹ Ibid.

²² A. Heringa *et al*, 'The EU Charter: Text and Structure', *Maastricht Journal of European and Comparative Law* 1 (2001), p. 13.

²³ OJ 2007 C 303/17. *Explanations relating to the Charter of Fundamental Rights*, It is stated in the document that 'these explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter'.

²⁴ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 3.

in the case law of the Court, seems to be the German *Grundrechte*, which is also an all-catching term.²⁵

The Charter does not provide a clear distinction between rights, freedoms and principles.²⁶ When it comes to rights and freedoms, no legally relevant distinction between the two concepts is drawn in the Charter. Some of the Articles are said to be rights (as can be seen from Article titles), e.g. Article 3 and 6, while others, e.g. Article 10 and 15, are entitled as freedoms. Moreover, the two concepts are merged in Article 11 with gives protection to ‘the right to freedom of expression’.

The second distinction, which attracted more attention, is between rights (freedoms) and principles. Article 51(1) of the Charter provides that the Union should ‘respect the rights, observe the principles’. This provision implies that the rights are enforceable while the principles are less clearly defined and may turn out to be unenforceable.²⁷

This distinction was highly important to the UK. They were concerned that social, economic, political and civil rights were all included in the same document, potentially enforceable in the national courts when Union law issues are involved, and before the Court of Justice. The UK reasoned that political and civil rights are in general negative ad hence do not require state resources while social and economic rights with their positive nature, do require state resources. With that in mind, the UK preferred the term ‘principles’ when it comes to social and economic issues. Following their policy and in order to make their point, the UK set in motion the amendment of ‘horizontal provision’ and as a result a new Article 52(5) was introduced. The Article states that principles will not be directly effective in national courts²⁸. The problem with the distinction remained however, as the Charter still does not clearly identify which Articles contain principles and which contain rights. Examples of the two categories were provided in the ‘explanations’ to the Charter²⁹. The two Articles causing concern for the UK were Article 28 on collective actions and agreements and Article 30 on unfair dismissal. According to the ‘explanations’ however, they appear to be rights rather than principles and are hence potentially justiciable.³⁰ Therefore, the UK did not achieve their purpose of obtaining a non-justiciable nature of Articles 28 and 30 of by the introduction of Article 52(5). This led to the drafting of the Protocol 30, which will be discussed below.

6. Application and Effect of the Charter

The scope of application of the Charter and its effect can be found in the document itself as well as in the aforementioned explanations and the attached Protocol. The two relevant provisions are Article 6(1) TEU and Article 51 of the Charter.

Article 6(1) TEU was discussed already as the provision that brought about the change of the legal status of the Charter as it provides that EU: “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal effect as the Treaties”.

Article 51 of the Charter provides that the Charter applies to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity. It also applies to

²⁵ Ibid.

²⁶ European Union Committee, ‘The Treaty of Lisbon: an impact assessment’, 10th Report of Session 2007-08, para. 5.15.

²⁷ Heringa *et al*, *Maastricht Journal of European and Comparative Law* 1 (2001), p. 13.

²⁸ C. Barnard, ‘The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ (2010), Trinity College Cambridge Resources, available at www.law.cam.ac.uk/faculty-resources/10007309.pdf, p. 4.

²⁹ OJ 2007 C 303/17, *Explanations relating to the Charter of Fundamental Rights*.

³⁰ C. Barnard, Trinity College Cambridge Resources (2010), p. 4.

the Member States but only when they are implementing Union law. Although this implies narrow scope of application, it has been pointed out by some Advocate Generals, e.g. Kokott,³¹ that the precise scope of the Charter's application to Member States has not yet been established. It might be possible that in the future the Court will start to apply the Charter also when fundamental rights are invoked in case of provisions taken by the Member States that derogate from the EU rules, and hence are not implementing but within the scope of Union law. This would result in a significant increase in the scope of the Charter. There are already some early indications that the court might be encouraged to broaden the view on the applicability of the Charter in relation to the Member States.³²

Article 51(2) of the Charter builds on Article 6(1) TEU and provides that "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task of the Union, or modify powers and tasks as defined in the Treaties". This is in fact a repetition of what is already included in Article 6(2) TEU. The importance of this provision is also stressed in the 'Explanations'.³³

'Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties.'

This 'horizontal provision' was indented to reassure the Member States that the Charter would not expand the Court's competence to legislate. Nevertheless, some countries expressed that point again in their declarations to the Charter. Poland's Declaration focuses on the Member States' right to legislate:

*'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'*³⁴

The Czech's Declaration stresses again the importance of Article 51 of the Charter:

*'The Czech Republic recalls that the provisions of the Charter of Fundamental Rights of the European Union are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States, as reaffirmed in Declaration (No 18) in relation to the delimitation of competences. The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.'*³⁵

The apparent abundance of clarifying documents raises the question of the reason why two, or in fact in due course three, of the Member States (Poland, the United Kingdom and the Czech

³¹ Joint Cases C-483/09 and C1-/10, para.77.

³² Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 13, basing opinion on Case C-34/09 *Zambrano*, paras 156-177.

³³ OJ 2007 C 303/17, *Explanations relating to the Charter of Fundamental Rights*.

³⁴ (2007/C 306/02), 61. Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union.

³⁵ (2007/C 306/02), 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union.

Republic) decided to sign an additional Protocol on the application of the Charter. This issue, together with the nature of the document, will be examined in the next part of my paper.

7. *Protocol No 30*

Protocol on the Application of the Charter to Poland and United Kingdom (No 30) has been devised when the leaders of the EU had to agree on a successor to the failed Constitutional Treaty. It was intended to note “the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter”. In order to achieve their goal, the two Member States agreed upon two provisions, which were annexed to the Treaties. Also, it was agreed in October 2009 at a European Council meeting, that the Czech Republic will join the Protocol when the next Accession Treaty will be concluded.³⁶

The Protocol contains two provisions. Article 1(1) states:

‘The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’

The key phrase in this provision seems to be ‘does not extend’. The Article 1(1) merely restates what is already contained in the Charter and hence is of no legal relevance.³⁷ The Article does not prohibit the Court from ruling on disputes occurring in those Member States. It stresses that no new competences can follow from the application of the Charter to the courts of Poland, the UK or the European Union. It does not however, limit in any way the already existing competences. Hence, Article 1(1) of the Protocol does not give Poland and the UK ‘opt-out’ statuses from the Charter. From this part one can hence conclude that no special treatment applies for the two (three in the future) Member States.

Having discussed Article 1(1), I will follow with Article 1(2):

‘In particular, and for the avoidance of doubt, nothing in the Title IV of the Charter creates justiciable rights applicable to Poland or to the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.’

This provision focuses on Title IV of the Charter, which is entitled ‘Solidarity’. The Title contains twelve Articles, six of which include a reference to being ‘in accordance with national laws and practices’. From that one can assume that Article 1(2) of the Protocol does not provide any further limitation and was added, as states in the provision itself, ‘for the avoidance of doubt’. The purpose of Article 1(2) seems to be to stress that the ‘national laws and practices’, when it comes to Poland and the United Kingdom, are the ‘national laws and practices’ of Poland and the United Kingdom accordingly, and not of other Member States.

As I have discussed before, the UK thought that the content of this Title includes principles and hence opted for the introduction of a ‘horizontal provision’, Article 52(5) of the Charter, which states that principles will not be directly effective in national courts. However, unfortunately for the UK, not all of the six remaining Articles of Title IV were drafted in terms of principles but are regarded instead to have the nature of rights. By the introduction of Article 1(2) of the Protocol, those provisions are not justiciable in respect of the UK and Poland. If this analysis is correct, then this Article of the Protocol might be of legal

³⁶ D. Chalmers, *European Union Law*, (Cambridge, 2010), p. 257.

³⁷ Groussot *et al*, 173 *Foundation Robert Schuman, European Issue* 6 (2010), p. 8.

significance.³⁸ The two provisions of the Charter that the UK was sensitive about were Articles 28 and 30. The first one provides *inter alia* for a right to strike. In the UK there is in general no 'right to strike' but the trade unions enjoy immunity from being sued for it in tort providing that certain conditions are satisfied. The UK was worried that the differences in conceptual approaches would result in the Court of Justice being a foe rather than an ally when it comes to strike cases in the UK.

The other provision in question was Article 30, which provides that every worker has the right to protection against unjustified dismissal in accordance with Union law and national laws and practices. This right has not been previously recognised by the Court of Justice while the UK have already had a system and case law tackling the problem of dismissal. Article 2 of the Protocol ensures that:

'To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.'

By virtue of this Article, the national rules that govern the dismissal continue to apply. This is not however a special limitation, but a clarification of what is already included in the Charter: those provisions of the Charter that contain reference to the national laws and practices act as limits on the Charter.³⁹ Again, this provision does not seem to have any legal significance.

While analysing the Protocol, one cannot help but wonder about the reasons why Poland decided to join the Protocol as it seems that it was designed only to satisfy the UK's need for clarification. From the analysis above, it seems that only Article 1(2) of the Protocol has legal significance and only when it comes to some of the provisions of one of the six relevant Titles of the Charter. To add confusion, Poland decided to include a Declaration that in fact undermines any potential use of Article 1(2) of the Protocol:

*'Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.'*⁴⁰

The question remains, what was then the reason to join the Protocol. It seems that the Polish President at the time, Lech Kaczynski, decided to sign the Protocol to once again underline what has been also included in another Polish Declaration added to the Charter:

'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'

It has been argued that, as can be seen from the Declarations, Poland did not have special interest in the rights of workers but rather expressed fears of laws relating to moral values, e.g. abortion. The Protocol however is not of legal relevance when it comes to those fields.⁴¹ One can assume that the Polish (and in due course Czech) reason to join the Protocol was rather to 'clarify certain aspects of the application of the Charter' as written in the Protocol itself.

³⁸ Anderson *et al*, *European University Institute, EUI Working Papers* 8 (2011), p. 12.

³⁹ Ibid.

⁴⁰ (2007/C 306/02), 62. Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom

⁴¹ C. Barnard, *Trinity College Cambridge Resources* (2010), p. 15

From the analysis of the Protocol it appears clearly that Poland and the UK are not ‘opt-outs’ from the Charter. The European Union Committee stated, “Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol”.⁴² The Protocol has been criticised for its lack of clarity and a possibility of variety of interpretations.⁴³ Currently, there is a reference pending before the Court of Justice in a UK/EU case *Saeedi*. The key point is whether it is allowed for the UK to transfer an asylum seeker to Greece under the Dublin Regulation notwithstanding the likelihood of ill-treatment and disrespect for the Charter there (as argued by the claimant and the United Nations High Commissioner for Refugees). Mr Justice Cranston held that “ Given the Polish and United Kingdom Protocol, the Charter cannot be directly relied on as against the United Kingdom although it is an indirect influence as an aid to interpretation.”⁴⁴ As this contradicts the conclusions of the House of Lords’ European Union Committee, the Court of Justice was asked by the UK Court of Appeal to provide a definite answer on the status of the Protocol in the EU law. The decision of the Court will hopefully clarify the issue and most likely the Court will disagree with Mr Justice Cranston’s words.

Professor Barnard argued⁴⁵ that it was the aim of the UK government that the less-informed, Eurosceptic audience believes that the Protocol creates an ‘opt-out’ while for the more-informed audience the UK government insisted that the Protocol was just a clarification. It seems that the Protocol was introduced for political reasons in order to convince the British voters that the new Lisbon Treaty was different than the Constitutional Treaty. Similar aim might have been served in Poland, where a right-wing President, Lech Kaczynski, wished to confirm to his Eurosceptic voters that the national moral values, as ensured in national legislation, are not in danger due to the change of the Charter’s legal status.

8. Conclusion

In this essay, I have looked at the origins, content and effect of the Charter. These steps were necessary in order to fully understand the relation between the Protocol No 30 and the Charter.

The Charter has now the same legal value as the Treaties and can be hence regarded to be the Union’s bill of rights. The Charter in fact codified general principles and fundamental rights that have been already available and used. The ‘horizontal provision’ and the Protocol No 30 are measures aimed at ensuring that the Charter will not be used as a tool to extend the Union’s powers or as a legislative basis.

The Protocol does not provide for ‘opt-out’ status of Poland and the UK. It also does not introduce a distinction between the meaning of fundamental rights in the two (in the future three) countries and other Member States. From my analysis I can conclude, that fundamental rights within the meaning of EU law, are not different in the UK, Poland and Czech Republic. Undoubtedly, differences in the legal systems of the Member States do exist but are permissible only as long as in conformity with the provisions of the Treaties and the Charter.

⁴² European Union Committee [2007-8], 5.87.

⁴³ Ibid.

⁴⁴ [2010] EWHC 705, MR JUSTICE CRANSTON, para 155.

⁴⁵ C. Barnard, Trinity College Cambridge Resources (2010), p. 15.

WHO SHOULD HAVE THE LAST WORD ON FUNDAMENTAL RIGHTS IN THE EU: THE ECtHR, NATIONAL CONSTITUTIONAL COURTS OR THE CJEU?

Emma Carpenter

1. Introduction

The title question of this paper appears at first to be primarily a question of right. Which jurisdiction should, legally, prevail? However, there are immediate problems with such an approach, for each of the three courts discussed here - the ECtHR, the CJEU, and the national constitutional courts, along with their defining legal sources - all persistently and, sometimes, uncompromisingly claim supremacy over one another. There is similarly little help to be found in a structural analysis of the court systems of Europe: variations in national systems, and the indeterminate and, for now, informal relationship between the CJEU and the ECtHR make it impossible to find a clear hierarchy.

Instead, a solution must be found in a more pragmatic manner. I ask not which court has the right to the last word, but which court is best equipped to give the last word in a manner which provides effective protection for fundamental rights.

This paper examines the three courts in turn, focusing on the ideology and purpose of their fundamental rights interest, the substantive norms they apply, the practical influence of their judgements, and their procedural strengths and weaknesses, particularly regarding access for the archetypal victim of fundamental rights breaches - individuals. The relationships and interactions between the courts are then examined, with a (very) short consideration of how those relationships might change if the EU accedes to the ECHR. Finally, a model is proposed by which fundamental rights protection can be assured in as effective a manner as is realistically possible.

2. The European Court of Human Rights

The ECtHR is unique in Europe as being the only court whose sole and, more importantly, overriding interest is in the protection of fundamental rights. It is inseparable from the ECHR and, as such, some of the constitutional qualities sometimes conferred on the ECHR¹ may be inferred to its court. Similarly, the goals of the ECtHR are inseparable from those of the ECHR. Historically, the goals of the ECHR and those of the EU's predecessors are similar: a desire to promote and ensure peace, convergence, a distinct identity, and respect for democracy and the rule of law within Europe.² In the case of the ECHR, this is achieved through the protection of fundamental rights.

Although treaty-based and, therefore, typically interested in movements on the nation state level alone; the ECtHR has distinguished itself by allowing and, indeed, focusing upon issues at the level of individuals.³

The primary source of law applied by the ECtHR, and its only official authority, is of course the ECHR. The special characteristics of the ECHR could warrant a paper in and of

¹ Notably by the Court itself in *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1. See also the penultimate section, on relationships between the courts, for further examples.

² Steven Greer & Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?', 15 *European Law Journal* 4 (2009), p. 462.

³ *Ibid.*

themselves: certainly, it is sterner than most treaties, having been described in *Bosphorus*⁴ as a 'constitutional instrument of European public order' and being thus far immune to normal rules such as *lex posteriori*.⁵ Substantively, it may well be considered the benchmark of fundamental rights in Europe, having been a significant inspiration for the EU's Charter of Fundamental Rights, and holding sway in every national legal system in Europe.

However, it would be short-sighted to presume that the ECtHR restricts itself to recourse to the ECHR alone. The ECtHR has often discussed the jurisprudence of the CJEU, but has never considered it to be more than persuasive. More significant are the state-level principles of 'margin of appreciation' and 'evolutionary interpretation', and their impact on the substance of the ECHR.

The principle of 'margin of appreciation', combined with the ability of high contracting parties to make reservations, in some cases under controversial circumstances (albeit in a restricted manner),⁶ has led to criticism of the legal certainty of the ECtHR's regime. The issue of flexibility in international law, its necessity, and whether or not it is desirable, is one which has been discussed extensively, and is beyond the scope of this paper. It is sufficient, here, to simply state that the fundamental rights as guaranteed in the framework of the ECHR are the least theoretically rigid of the three European models discussed. National interests, and the discretion afforded to parties, have a strong influence on the effects of the ECHR's fundamental rights in the field.

The doctrine of 'evolutionary interpretation'⁷ is particularly interesting, and offers an arguably more significant opening for external influence on the ECtHR order. Evolutionary interpretation has its roots in the concept of fundamental rights being an aspect of a common European social conscience, and is used by the ECtHR to justify developments in the substance of ECHR rights on the grounds of 'consensus among signatories', as for example in the cases *Fretté v France*⁸ and *E. B. v France*⁹, in which the court reversed its position apparently due to a change in such accord. Although it is not clear how 'consensus among signatories' is judged, it is clear that there is consideration of national developments, presumably including those of a legal character, inherent in the court's application of the ECHR.

The legal power of the ECtHR's rulings is clear: they are binding.¹⁰ In practise, this is mostly borne out: the ECHR has one of the strongest enforcement strategies in international law,¹¹ with mechanisms laid out in Article 46 ECHR for oversight of compliance, and a further reference to the ECHR should a state party fail to fulfil its obligations. Furthermore, the ECHR and the ECtHR jurisprudence has traditionally been applied rigorously in other courts,

⁴ *Bosphorus Hava Yollari Turizm v Ireland* [2006] 42 EHRR 1.

⁵ Iris Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights law in Europe?', 25 *European Law Review* 1 (2000), 3. See, on the special status of human rights treaties generally, Alexandre Kiss, 'International human rights treaties: A special category of international treaty?' in Venice Commission (ed.), *The status of international treaties on human rights*, (Council of Europe Publishing, 2006), p. 11.

⁶ Exemplified by the case *Brannigan and McBride v UK* ECHR Series A (1993) No. 258-B, in which the UK adopted a reservation *ex post*, following rulings that the relevant provisions of national law were in breach of the ECHR. Restrictions on the creation of reservations may be found in Art. 56 ECHR, and are detailed in Kiss, *The status of international treaties on human rights*, p. 11.

⁷ Established in *Hirst v. United Kingdom*, no. 74025/01, judgement [GC] October 6, 2005. cf Eirik Bjorge, 'National supreme courts and the development of ECHR rights', 9 *International Journal of Constitutional Law* 1 (2011), 5; and Bernhard Hofstötter, 'European Court of Human Rights: Positive obligations in *E. and others v United Kingdom*', 2 *International Journal of Constitutional Law* 3 (2004), p. 525.

⁸ *Fretté v. France* [2002] 38 EHRR 438.

⁹ *E. B. v. France* [2008] ECHR 55.

¹⁰ Art. 46 ECHR

¹¹ Martin Dixon, *International Law* (6th edition, OUP, 2007), p. 353.

both national courts and the CJEU.¹²

Politically, the ECtHR exhibits a detachment which may improve its credentials as a court of fundamental rights. While national courts and the CJEU (generally) strive sincerely to apply the law without bias, it is inevitable that they cannot remain uninfluenced by either politics or common practise in their own systems, and they certainly have an interest in minimising interruptions to the functioning of their respective legal systems: this may not be appropriate in fundamental rights law.¹³ However, that same detachment may work against the ECtHR, placing it too far distant from the carrying on of actual violations for its formidable enforcement mechanisms to be effective. This perhaps plays a role in the weakness of the ECtHR as regards repeated violations, which are often not resolved even after findings against the violators.¹⁴

A significant challenge is posed to the influence of the ECtHR by the position of the EU and its acts, especially in light of the long-term pie in the sky status of the prospect of EU accession to the ECHR. This question, however, will be addressed later.

Formally, access to the ECtHR is very much open. Despite its origins as an inter-state organisation, it has moved almost entirely away from inter-state disputes, with the individual application procedure under Article 34 ECHR being by far the most commonly used.¹⁵ Systems of filtration of claims exist, with admissibility criteria given in Article 35 ECHR, which are non-restrictive, and unremarkable in the general scheme of judicial limitations. The ECtHR should be very easily accessible.

However, the ECtHR is also sufferer of the most staggering workload problems of the three courts discussed. At the end of 2011, 139 650 cases were pending, with the Court receiving 20 100 applications more than the number of cases it completed during that year.¹⁶ This overload necessarily results in huge delays for litigants, and has been characterised¹⁷ as an unsustainable crisis within the ECHR framework: certainly, it makes complaints about delays in the work of the CJEU appear laughable.

3. *The Court of Justice of the European Union*

In sharp contrast with the ECtHR, the CJEU's primary concern is not fundamental rights. The court's formal *raison d'être* may be found in Article 19 TEU: furthermore, it is subject to the goals set out in Article 2 TEU, notably that of developing EU law in a manner which '[ensures] the effectiveness of the mechanisms and the institutions of the Community'. This context in which the CJEU functions may raise concerns¹⁸ of conflicts of interest: when the CJEU is faced with a choice between protecting the stability of the EU, and protecting fundamental rights, might it not be tempted to prioritise the former at the expense of the latter? It is, however, worth noting that the same is true of national constitutional courts: the CJEU's Union priorities make it no more callous of fundamental rights than the national

¹² Examples might include *In re G (Adoption: Unmarried Couple)* [2008] U.K.H.L. 38; and Joined Cases C-402 & C-415/05P, *Kadi v. Council of the European Union*, and *Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. 299. cf Mehrdad Payandeh & Heiko Sauer, 'European Union: UN sanctions and EU fundamental rights', 7 *International Journal of Constitutional Law* 2 (2009), p. 306.

¹³ Canor, 25 *European Law Review* 1 (2000), p. 3.

¹⁴ Greer & Williams, 15 *European Law Journal* 4 (2009), p. 462.

¹⁵ Tobias Lock, 'EU accession to the ECHR: implications for the judicial review in Strasbourg', 35 *European Law Review* 6 (2010), p. 777.

¹⁶ European Court of Human Rights, *Analysis of Statistics 2010*, (2011). Available at: http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38-85F4-A93113A78F10/0/Analysis_of_statistics_2010.pdf (Last accessed 25/4/2012).

¹⁷ In a striking criticism of the individual focus of the ECtHR as cause of these problems, Greer & Williams, 15 *European Law Journal* 4 (2009), p. 462.

¹⁸ Such as those noted in Canor, 25 *European Law Review* 1 (2000), p. 3.

priorities of constitutional courts, who do not generally make it their business to upset the domestic legal order either. It is also worth noting that the *Kadi*¹⁹ judgement and the new legal status of the Charter of Fundamental rights, as per Article 6 TEU, have afforded 'constitutional' status to human rights.

Given that fundamental rights are not the primary concern of the CJEU, the question arises as to how they fit into its remit. Their introduction has been described variously as a tool of integration, an attempt to create a distinct EU identity, and a measure intended to lend legitimacy to a growing EU regulator.²⁰ In any case, the *ad hoc* development of EU fundamental rights law has left it with many lacunae:²¹ the most significant being those created by the limits of EU competence, which leave breaches in reserved matters, such as family law, without remedy before the CJEU. Although the CJEU has shown itself willing to use creative interpretation to broaden its jurisdiction significantly,²² it is nonetheless not yet omnipotent.

The sources of fundamental rights law applied by the CJEU are various, most obvious among them EU primary and secondary legislation. However, the lack of any general fundamental rights competence of the EU transports the substance of fundamental rights law outside of the Treaties. 'Principles common to the member states'²³ are mentioned, but rarely is national law deferred to by the CJEU. The two monoliths are the ECHR and the Charter on Fundamental Rights, both of which have questionable legal status.

The ECHR has long had significant influence in the CJEU,²⁴ even before its formal recognition in Article 6 TEU, despite the EU not being party to it. Meanwhile, the Charter remains in legal and political limbo. Substantively there are few significant differences between the rights guaranteed by the ECHR and those by the Charter, although the Charter considers its own protections to be broader in scope in some cases.²⁵ This raises the question of whether the CJEU may, in future, require a higher standard of protection of certain rights than would be ordered by the ECtHR: critics might say that the issue is unlikely to arise.

The many obstructions to the CJEU's development of fundamental rights law have resulted in its application being weaker than in many other areas of EU law.²⁶ There are no specific proceedings or remedies in place for dealing with fundamental rights violations aside from the anathematic Article 7 TEU, but more importantly, the EU has no effective fundamental rights monitoring. While it is common for the Commission to initiate infringement proceedings against member states in breach of other obligations; the EU body responsible for monitoring fundamental rights compliance both within the institutions and in the member states, the Fundamental Rights Agency, has greatly limited influence, and is often bypassed or ignored altogether.²⁷

To add to the problems created by the FRA's lack of efficaciousness, access to the CJEU for victims of fundamental rights violations is notoriously obfuscated. The predominant procedure used before the CJEU, that of the preliminary ruling, is perhaps the most

¹⁹ Joined Cases C-402 & C-415/05P, *Kadi v. Council of the European Union*, and *Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R., p. 299.

²⁰ For an overview of these positions, see Greer & Williams, 15 *European Law Journal* 4 (2009), p. 462.

²¹ cf Guy Harpaz, 'The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy', 46 *Common Market Law Review* (2009), p. 105.

²² Such as in the cases C-260/89, *ERT v DUP* [1991] ECR I-2925, and C-159/90, *SPUC v Grogan* [1991] ECR I-04685.

²³ Art. 6 TEU.

²⁴ See for example C-13/94, *P v S & Cornwall County Council* [1996] ECR I-2143, as per Cathryn Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 6 *Human Rights Law Review* 1 (2006), p. 87.

²⁵ Explanatory note to Art. 52 Charter; *Explanations relating to the Charter of Fundamental Rights* [2007] O.J. C 303/02.

²⁶ Greer & Williams, 15 *European Law Journal* 4 (2009), p. 462.

²⁷ *Ibid.*

'individual-friendly' procedure, as it relies on national courts which are generally accessible. However, the procedure is still focused on interactions between the national court and the CJEU, with the individual litigants having very little part in the proceedings.²⁸ Although other procedures are available, notably the infringement procedure under Article 263 TFEU, all are best suited for litigation among institutions and member states: *locus standi* is consistently difficult to achieve for non-privileged parties, and factors such as the short time limits for applications, and length and expense of proceedings, are prohibitive.²⁹

Another significant problem is that of the CJEU's workload. Despite the comparative speed of the CJEU's work as against that of the ECtHR,³⁰ the CJEU nonetheless had 799 cases pending at the end of 2010, with an average waiting time of 12.3 months before resolution.³¹ Although this is a significant improvement over 2004's figures,³² it is a significant problem; and there is notable scepticism about how long the improvement will last, as the numbers of cases referred from the newer member states increase³³ - although it is equally notable that the feared floodgates have not yet shown signs of being opened.

Even as the CJEU succeeds in reducing waiting times for cases heard before it, this is not necessarily a good thing for fundamental rights protection. In 2010, the CJEU completed 574 cases.³⁴ This indicates a very brief handling of cases, which has been demonstrated elsewhere to be likely to lead to an increase in contradictory jurisprudence.³⁵ It may also indicate that insufficient time is allocated to serious questions of fundamental rights, resulting in rushed and flawed decision-making.³⁶ This is a suspicion which the CJEU's opaque style of reporting does little to dispel.

4. National Constitutional Courts

Any analysis of the fitness of national constitutional (or supreme) courts to assess fundamental rights issues is hampered by the wide variations between these courts and the law they apply. This is, indeed, one of the strongest arguments against leaving fundamental rights to the sole care of national courts. However, national courts are nonetheless significant actors in the development of fundamental rights law, and so a general overview of their characteristics within Europe will be attempted.

National courts, alongside the CJEU, do not have fundamental rights as their primary interest. They, too, exist to - depending on the view taken of the judiciary in general - protect, preserve, and develop the law of their nation. However, fundamental rights are perhaps closer to the core of a national court's vocation: fundamental rights are commonly found embedded in national constitutions not by chance, but because they are a defining element of a state's

²⁸ Jan Komárek, 'In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure', 32 *European Law Review* 4 (2007), p. 467.

²⁹ Ibid.

³⁰ See above, section on the ECtHR. At the end of 2011, 139650 cases were pending before the ECtHR, with a deficit of 20100 cases. ECtHR, *Analysis of Statistics*, (2011).

³¹ Court of Justice of the European Union, *Annual Report 2010*, (Publications Office of the European Union, 2011).

³² 840 pending, average waiting time of 23.5 months. The Court of Justice of the European Communities, *Annual Report 2004*, (Luxembourg, 2005).

³³ Damian Chalmers, *European Union Public Law*, (OUP 2010), p. 182; Bo Vesterdorf, 'A constitutional court for the EU?', 4 *International Journal of Constitutional Law* 4 (2006), p. 607.

³⁴ CJEU, *Annual Report 2010*.

³⁵ Komárek, 32 *European Law Review* 4 (2007), p. 467.

³⁶ Vesterdorf, 4 *International Journal of Constitutional Law* 4 (2006), p. 607.

vertical relationship with its citizens.³⁷ In that sense, national constitutional courts protect the state's 'constitutional identity' by way of remedying fundamental rights violations: the traditional description of the courts as a check on the other arms of government (which, nowadays, may well be considered to include the EU)³⁸ is apt.

In terms of sources of fundamental rights law, national constitutional courts make use of, and are bound by, the greatest diversity of sources. The binding nature of these sources suggests that national courts may offer the highest level of protection available, as they would generally apply the highest of the various norms: however, no system is entirely consistent, and the existence of successful CJEU and ECtHR appeals against national judgements demonstrates that this is often not the case.

In determining fundamental rights issues, national courts have recourse to national law, often in the form of fundamental rights enshrined in the national constitution; EU law or, more to the point in cases of fundamental rights, CJEU jurisprudence; and the ECHR. However, in the case of national courts, the meaningful question is not which norms apply, but how these norms interact.

This is a question which is answered very differently around the EU. The binding nature of CJEU jurisprudence is well-established, and generally respected. In Austria, the ECHR, as an international treaty, has constitutional status, giving it great sway over other norms.³⁹ Germany, on the other hand, uses the ECHR to interpret the fundamental rights given in the Basic Law;⁴⁰ while in the *Solange* case⁴¹ the German constitutional court effectively handed over the reins of interpretation of EU fundamental rights law to the CJEU - albeit under conditions. The ECHR is fully incorporated into monist Dutch law;⁴² and while the UK House of Lords and Supreme Court have often been criticised for their limited formal ability to protect fundamental rights, reliance on *stare decisis* and the Human Rights Act 1998 provide a reasonably robust system.⁴³

Although it is difficult to draw general conclusions from such variety, it is at least true that, in all cases, the ECHR and the jurisprudence of the CJEU may be relied upon with reasonable certainty of success. It is also the case that the rights provided by constitutions do not vary drastically - although they are also far from uniform. Substantively, at least, the fundamental rights protection under national constitutional courts is roughly equivalent.

The influence of national constitutional courts also varies significantly, but thankfully is easier to categorise. On the one hand, traditional constitutional courts, such as that of Germany, tend to have extensive unilateral powers: something which is missing in the CJEU and, particularly, ECtHR regimes, which rely on the co-operation of national authorities. Courts may annul national acts or legislation,⁴⁴ or disapply them:⁴⁵ such powers are arguably the epitome of fundamental rights enforcement.

On the other hand, there are various constitutional courts with much more limited powers.

³⁷ cf José Manuel M Cardoso Da Costa, 'Constitutional supremacy of human rights treaties' in Venice Commission (ed.), *The status of international treaties on human rights*, (Council of Europe Publishing, 2006), p. 77.

³⁸ As evidenced by the multitude of examples of national courts reviewing EU measures, e.g. the German and Czech rulings on the Lisbon treaty. Czech Constitutional Court rulings Pl. ÚS 19/08 [2008] and Pl. ÚS 29/09 [2009]; German Constitutional Court ruling BVerfG, 2 BvE 2/08 [2009].

³⁹ M Cardoso Da Costa, in Venice Commission (ed.), *Status of international treaties*, p. 77.

⁴⁰ Bjorge, 9 *International Journal of Constitutional Law* 1 (2011), p. 5.

⁴¹ BVerfGE 37, 271 2 BvL 52/71.

⁴² Art. 120 Dutch Constitution.

⁴³ Greer & Williams, 15 *European Law Journal* 4 (2009), p. 462.

⁴⁴ Aalt Willem Heringa & Philipp Kiiver, *Constitutions Compared*, (2nd edition, Intersentia, 2009).

⁴⁵ Interestingly, the UK Supreme Court appears, following *In re G (Adoption: Unmarried Couple)* [2008] U.K.H.L. 38, to have this power on a limited basis, despite its otherwise not fitting into this first category of courts.

Examples include the Dutch and Swiss supreme courts, which are both unable to review national legislation in light of the constitution - but nevertheless protect fundamental rights by reviewing in light of international norms.⁴⁶ The UK Supreme Court would also generally be considered part of this category, as the Human Rights Act affords it only the ability to issue non-binding 'declarations of incompatibility' when reviewing legislation, although this is subject to the exception found *In re G*.⁴⁷

These courts necessarily have a significantly weaker influence than those with greater unilateral powers - although this distinction may be relegated to the theoretical, in light of the political realities of the relationships between courts and governments. Furthermore, as can be seen above, even weaker constitutional courts will generally have greater than usual powers in the area of fundamental rights, due to the weight afforded to international and supranational fundamental rights norms.

It is also worth noting that national constitutional courts act as a check not only on national authorities, but also, in extreme cases, on the EU. The clearest example of this is the notorious *Solange* case⁴⁸, in which the German Constitutional Court made it clear that it considers itself competent to disapply EU legislation, should a pattern of fundamental rights abuses at the EU level emerge. Other examples, not specifically connected to human rights, would include the German and Czech courts' rulings on the Lisbon⁴⁹ treaty.

National constitutional courts represent the most accessible arena for individuals to bring claims regarding fundamental rights. As a general rule, the requirements for access to lower levels of national court systems are minimal. Higher courts, including constitutional courts, have heavier requirements; these range from requiring leave to appeal to the UK Supreme Court,⁵⁰ to the admissibility of constitutional complaints in Germany, without exhaustion of other remedies, only in cases of general importance.⁵¹ The Italian *Corte di Cassazione* is exceptional, in that it answers all applications it receives.⁵²

National constitutional courts' workload and delay problems may be less notorious than those of European courts, but they are not necessarily less significant. The UK Supreme Court emerges victorious, with its largest number of pending cases at any point during 2009 having been 21.⁵³ The German constitutional court fares less well, with its pending cases at the end of 2009 numbering 2905, and the average wait for a resolution being around 16 months.⁵⁴ The Italian *Corte di Cassazione*, with its exceptional obligation to entertain all applications, averaged a 40 month delay for cases completed in 2010.⁵⁵ These statistics may suggest - mostly - a more deliberative approach than that taken by the CJEU, but they also highlight that, at any level of the judicial system in Europe, fundamental rights violations are unlikely to be resolved in a particularly rapid manner.

⁴⁶ M Cardoso Da Costa, in Venice Commission (ed.), *Status of international treaties*, p. 77.

⁴⁷ *In re G (Adoption: Unmarried Couple)* [2008] U.K.H.L. 38.

⁴⁸ BVerfGE 37, 271 2 BvL 52/71.

⁴⁹ BVerfG, 2 BvE 2/08; Pl. ÚS 19/08; Pl. ÚS 29/09.

⁵⁰ Access to Justice Act 1999 and related acts.

⁵¹ Mauro Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International and Social Trends', 25 *Stanford Law Review* (1973), p. 651.

⁵² Komárek, 32 *European Law Review* 4 (2007), p. 467.

⁵³ Website of the UK Supreme Court, <http://www.supremecourt.gov.uk/about/statistics.html> (Last accessed 25/4/2012).

⁵⁴ Inferred from the somewhat unclear statistics on the website of the Bundesverfassungsgericht, <http://www.bundesverfassungsgericht.de/en/organization/gb2009/A-IV-3.html> (Last accessed 25/4/2012).

⁵⁵ Corte Suprema di Cassazione, *Inaugurazione Anno Giudiziario 2011*. Available at: http://www.cortedicassazione.it/Documenti/2_indice_TABELLE_CIVILE_CASSAZIONE.pdf (Last accessed 25/4/2012).

5. *Relationships between the Courts*

For the most part, the CJEU's relationship with national constitutional courts is fixed by the seminal rulings on direct effect, and related issues. On those rare occasions when a national court does challenge the CJEU, it is almost always on constitutional grounds, and fundamental rights often play a role; as exemplified by *Solange*.⁵⁶ It is worth noting that preliminary rulings are used to excess:⁵⁷ in this sense, there is a high level of integration, and co-operation, between these two elements of Europe's judicial system.

The relationship between national courts and the ECtHR is defined by the principle of evolutionary interpretation: both in terms of allowing the ECtHR to develop novel solutions based on national opinion, and of allowing - and, in the cases of *Van Kück*⁵⁸ and *Goodwin*,⁵⁹ requiring - national courts to do so themselves.⁶⁰ The influence of this latter part should not be overestimated, however: despite the UK Home Office explicitly encouraging judges to make use of this discretion,⁶¹ they have been reluctant to do so, especially if considering a conclusion which conflicts with existing ECtHR jurisprudence.⁶²

The doctrine of margin of appreciation is also significant, though not evidently controversial: it has been used, in particular, to assign a wider scope to ECHR rights than is apparent from ECtHR jurisprudence.⁶³ The combination of these two factors suggests a system whereby the ECtHR and national courts develop the substance of fundamental rights law jointly and co-operatively, in a flexible and pragmatic manner, but with the risk of distortion and variability.⁶⁴

By far the most fraught relationship in the European fundamental rights constellation is that of the CJEU and the ECtHR. The CJEU has developed a deferential attitude towards the ECtHR, and now considers itself bound to some extent by ECtHR jurisprudence.⁶⁵ Indeed, in *Roquette*,⁶⁶ the CJEU reversed its position in order to align with the ECtHR's judgement. The Commission, on the other hand, predicted the EU's Armageddon should the ECtHR have binding jurisdiction over it, in its submissions on the *Bosphorus* case.⁶⁷ The ECtHR, in return, has adopted a modified version of the *Solange* position; although unlike the German constitutional court, it reserves the right to review the question of whether or not the EU provides 'equivalent protection' of fundamental rights on a case-by-case basis.

The exception to this ceasefire regards review of primary EU legislation. It was decided in *Matthews*⁶⁸ that, as the CJEU has no jurisdiction to review primary EU instruments, the ECtHR would continue to review such instruments. The CJEU, in return, has refused to accept any binding authority on the interpretation of the Treaties.⁶⁹

⁵⁶ BVerfGE 37, 271 2 BvL 52/71.

⁵⁷ Well-criticised in Komárek, 32 *European Law Review* 4 (2007), p. 467.

⁵⁸ *Van Kück v. Germany* [2003] 37 E.H.R.R. 51.

⁵⁹ *Goodwin v. United Kingdom*, [2002] 35 EHRR 447.

⁶⁰ cf Bjorge, 9 *International Journal of Constitutional Law* 1 (2011), p. 5.

⁶¹ *Rights brought home: the Human Rights Bill*, 1997, Cm 3782.

⁶² *R v. Horncastle & Others* [2009] U.K.S.C. 14; however made unclear by *Cadder v. Her Majesty's Advocate* [2010] U.K.S.C. 43.

⁶³ *In re G (Adoption: Unmarried Couple)* [2008] U.K.H.L. 38; *Kloeckner*, Cour de cassation, 14 June, 1996.

⁶⁴ cf M Cardoso Da Costa, in Venice Commission (ed.), *Status of international treaties*, p. 77.

⁶⁵ Sionaidh Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*', 43 *Common Market Law Review* (2006), p. 629.

⁶⁶ C-94/00, *Roquette Freres* [2002] ECR I-9011.

⁶⁷ *Bosphorus Hava Yollari Turizm v Ireland* [2006] 42 EHRR 1, as explored by Costello, 6 *Human Rights Law Review* 1 (2006), p. 87.

⁶⁸ *Matthews v. United Kingdom* [1999] 28 EHRR 361.

⁶⁹ Opinion 1/91, [1991] ECR I-6079; Opinion 1/92, [1992] ECR I-2821; Joined Cases C-402 & C-415/05, *Kadi v. Council of the European Union*, and *Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. 299.

It is this issue which may prove contentious if the EU moves forwards with its plans to accede to the ECHR. There is extensive analysis available on the question of how a hierarchy between the CJEU and the ECtHR should function within the framework of the ECHR: it seems highly unlikely that accession will succeed without a similar authority over the CJEU being granted to the ECtHR as it now holds over national courts. Regardless of procedural questions, the issue of Treaty interpretation is significant: should the CJEU remain intractable, the formal relationship between it and the ECtHR would remain awkward, with the greatest development being the ability of the ECtHR to review acts of EU institutions.⁷⁰

The doctrine of *Matthews* is reminiscent of Article 35 ECHR's provisions on exhaustion of domestic remedies, perhaps providing for the possibility of the ECtHR acting as a limited appeal court against fundamental rights decisions of the CJEU. However, the limited fundamental rights work of the CJEU restricts the impact of this prospect.

Perhaps the most significant advantage of EU accession would be the removal of remaining confusion over whether or not national acts may be 'shielded' from ECtHR jurisdiction by the involvement of EU law. Given the ever-growing reach of EU law, this is a highly desirable outcome.⁷¹

6. Conclusion

None of the courts in Europe are individually suited to be the sole or primary arbitrator of fundamental rights disputes.

The ECtHR has a substantive advantage, with the ECHR and its flexibility providing the opportunity for strong and consistently up-to-date fundamental rights protection, despite the detraction of reservations. It is also the only court which is necessarily fully detached from the acts being reviewed. However, there are flaws in its enforcement, and its caseload problems are staggering: it is clearly not capable of bearing the full burden of fundamental rights adjudication throughout Europe.

The CJEU is effective in terms of compliance. However, its large caseload both delays proceedings and distracts from thorough examination of fundamental rights issues. Its limited competences and the lack of clarity as regards the substance of EU fundamental rights law negatively effect the robustness of its fundamental rights regime, and the limited access available to individuals is unsuitable in the area of fundamental rights law.

National constitutional courts are often effective in adjudicating fundamental rights issues, and they tend to be relatively efficient, in the context of the generally inefficient systems discussed here. However, there are well-established and long-standing arguments against allowing national courts the last word on fundamental rights issues: I need not repeat them all here, but prime among them are the lack of consistency between different states' constitutional courts, and the necessity of external oversight of national activities.

The best solution is co-operation. Fundamental rights has long been a more universal area of law than most - certainly, co-operation within it is easier to procure than co-operation in many of the EU's policy areas. At the moment, the proliferation of variations on *Solange* has created a reasonably stable and consistent fundamental rights system. The various elements of this system complement each other.

The national constitutional courts are best suited to deal with the bulk of fundamental rights issues: if not simply by virtue of spreading the load, then because there is a certain legal coherence evident in resolving issues of vertical relationships between the state and the

⁷⁰ cf Lock, 35 *European Law Review* 6 (2010), 777, who also argues that attribution of EU acts to particular bodies by the ECtHR would be rendered near-impossible, as interpretation of the Treaties would be required.

⁷¹ cf Tim Eicke, 'The European Charter of Fundamental Rights - unique opportunity or unwelcome distraction', 3 *European Human Rights Law Review* (2000), p. 280.

citizenry at the domestic level.⁷² The vast majority of cases are settled satisfactorily at the domestic level, and elevating them further would be counterproductive. The same is, to some degree, true of the CJEU, although it is not as effective as national constitutional courts may be in reviewing acts of its own legal order.

Happily, fundamental rights are, for the most part, substantively aligned throughout Europe. Therefore, an irreconcilable conflict between courts is unlikely to arise. Were such a thing to occur, however, the substantive strength and independence of the ECtHR makes it best placed to have the last word. Its imperfect enforcement would then be compensated for by the function of national courts and the CJEU in applying its judgement. Its style of judgement is no disadvantage to it, as such a question would likely be of a magnitude warranting a careful and detailed published legal analysis by the court involved. This does not, however, mean that the ECtHR should be the dominant court of fundamental rights: the ‘bread and butter’ of European fundamental rights law belongs where it originates, with national courts and the CJEU.

⁷² cf Canor, 25 *European Law Review* 1 (2000), p. 3.

THE INDIRECT REVIEW OF EU ACTS BY THE ECtHR: A PRE—AND POST-ACCESSION ANALYSIS

Tom N. Dopstadt

1. Introduction

Since the beginning of the European integration process there have been two major institutions developed side by side. On the one hand the European Union (EU) and on the other hand the Council of Europe. Although there are fundamental differences between these two institutions, they emerged out of the same idea.¹

With the appearance of these institutions, two different judiciary systems came into being. The European Court of Justice's jurisdiction is based on the Treaty of the European Union² (TEU) and primarily concerned with the enforcement and interpretation thereof,³ the European Court on Human Rights (ECtHR) deduces its power from the European Convention of Human Rights (ECHR) and is the last instance of safeguarding human rights in Europe.⁴

Whilst former has not been involved in Human rights initially, through case law and the adoption of the Declaration of Fundamental Rights of the European Union,⁵ and the Charter of Fundamental Rights of the European Union (the Charter) it has entered into the field of Human and Fundamental Rights.

Therewith the possibility of divergent interpretation of the ECHR was created and the ECtHR had to established a mechanism governing these potential conflicts. This is to say when they deem it necessary to rule on the compatibility of EU acts with the ECHR.

However since the EU is about to accede to the ECHR, this mechanism will soon be superseded and replaced by a new mechanism as provided by the Draft Accession Agreement. This paper will therefore give a short summary of how both European Courts have dealt with this matter until now and pinpoint its pitfalls. The second part will be devoted to the solutions of these pitfalls as proposed by the Draft Accession Agreement (DAA). The final part will evaluate these proposed solutions and assess whether this leads to an improved mechanism for the review of EU acts, both from the EU's and the applicant's perspective.

2. The Mechanism for the ECtHR's Indirect Review of EU acts

2.1 The ECJ's Affirmation and Extension of Fundamental Rights Protection in the EU

There used to exist no institutional link between the two courts,⁶ in particular because the protection of fundamental rights within the European Union does not stem from the Treaty

¹ Junker, 'Council of Europe – European Union: A sole ambition for the European continent', Report to the attention of the Heads of State or Government of the Member States of the Council of Europe, (2006).

² And likewise the Treaty of the functioning of the European Union.

³ This is already enshrined in Art. 19 TFEU.

⁴ P. Craig, G. de Burca, *EU Law. Texts, Cases and Materials*, (Oxford University Press, 4th edition, 2008), p. 419; For a discussion about the different roles of the court see Case 118/75 Watson.

⁵ This adoption was mainly a result of the Solange I case of the German Constitutional Court (MaVerfGE 37, 271), for further information see e.g. Jacqu , 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', *Common Market Law Review* (2011), p. 998.

⁶ Junker, 'Council of Europe – European Union: A sole ambition for the European continent', Report to the attention of the Heads of State or Government of the Member States of the Council of Europe, (2006), p. 8.

itself.⁷ Fundamental rights received its foothold instead in the EU for the first time by the European Court of Justice (ECJ)⁸ in the case of *Stauder vs. City of Ulm*.⁹ Shortly thereafter the Court reaffirmed the guarantee of fundamental rights as inherent in Community law.¹⁰ Yet the court did not dwell at this stage for long, but soon after that stipulated in the *Nold vs. Commission* case¹¹ that international treaties to which the Member States have become a party to can be used as a source for the protection of fundamental right within the European Union. It went on by emphasizing the importance of these “external” sources of fundamental rights in the *Rutili* case.¹² Therein the ECJ for the first time directly referred to an Article of the ECHR.¹³ Followed by the *Johnston* case,¹⁴ the ECJ indicated the pre-eminence of the ECHR as regards EU’s fundamental rights and even stated in *Roquette Freres*¹⁵ that it “must take into account” the ECtHR’s judgements.

With the entry into force of the Lisbon Treaty the Charter obtained “the same value as the Treaties”,¹⁶ the TEU in Article 6 (1) now even refers to the ECHR as one of the sources of the EU’s fundamental rights.¹⁷

Therefore it can be said that the European Union and in particular the ECJ have done the first step towards a ‘vertical relationship between EJEU and the ECtHR’.¹⁸ Especially by the introduction of the protection of fundamental rights into EU law and the frequent references to the ECHR by the ECJ since 1986.¹⁹ The ECJ has thereby opened the possibility for a different interpretation of the ECHR between the two European Courts.²⁰ Consequently the ECtHR had to deal with the question when it will rule on a breach of the ECHR by the EU or to say the scope of its review.

⁷ Margaritis, ‘European Union accession to the European Convention on Human Rights: an institutional “marriage”’, *Working paper no. 65*, (2011) p. 3; Jacobs, *The European Constitution. How it was created. What will change.*, (Wolf Legal Publishers, 2005), p. 119.

⁸ It should however be noted that the Court in its judgements of the 50’s and 60’s, refused to consider fundamental rights, see case C-1/58 *Stork vs. High Authority* [1958-9] ECR 41 and joint cases C-16/59, C-17/59, C- 18/59 *Ruhr vs. High Authority* [1960] ECR 47.

⁹ Case C-29/69 *Stauder vs. City of Ulm* [1969] ECR 419; This became especially clear in *Stauder*, supra note 5, Grounds of judgment, para. 7. “...fundamental human rights enshrined in the general principles of community law and protected by the court”.

¹⁰ Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, Grounds, para. 4.

¹¹ Case C-4/73 *Nold vs. Commission* [1974] ECR 49 at para. 13.

¹² Case C-36/75 *Rutili vs. French Minister of the Interior* [1975] ECR 1219.

¹³ Jacqu , *Common Market Law Review* 48 (2011), p. 999.

¹⁴ Case 222/84 *Johnston* [1986] ECR 1651.

¹⁵ Case C-94/00 *Roquette Freres* [2002] ECR I-901.

¹⁶ Jacqu , *Common Market Law Review* 48 (2011), p. 998.

¹⁷ Art. 6(1) & (3) TEU, has however been subject to much controversy as the fundamental rights within the European Union are still based on a paradox. This is because external instruments, are the sources for the EU fundamental rights (Art. 6 TEU), yet not the “constitutive” thereof. See Chalmers p. 229 This paradox has been established in Joined Cases C-402/05 and C-415/05 *P Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6352; For a discussion why accession to the ECHR is still necessary after the adoption of the Charter of fundamental rights see Memorandum of 4 April 1979, Bulletin of the European Communities supp. 2/79, para. 8.

¹⁸ Andreangeli, *EU Competition Enforcement and Human Rights*, (Edward Elgar, 2008), p. 11.

¹⁹ Peers, ‘Limited responsibility of European Union member states for actions within the scope of Community law’, *European Constitutional Law Review* 2 (2006), p. 443.

²⁰ P. Craig, G. de Burca, *EU Law. Texts, Cases and Materials*, p. 410; Jacqu , *Common Market Law Review* (2011), p. 1001.

2.2 The Mechanism for Indirect Review as Introduced by the ECtHR

Since the European Union was not a party to the ECHR, it was neither bound to it in any way.²¹ Therefore the ECtHR could not “officially” review the conformity of EU law with the ECHR.²²

The question of indirect review of EU acts by the ECtHR has been addressed in several cases. From the judgment of the ECtHR in *M & Co*²³ and *Matthews*²⁴, it can be concluded that the ECtHR has only principally accepted to review EU acts in certain cases. This however meant in fact that it agreed to rule on the EU’s law conformity with the ECHR.²⁵

In *M & Co*,²⁶ it was held that only because states implement EU measures, they are not excluded *ipso facto* from ECtHR’s jurisdiction. It was further stipulated that the ECJ in its judgments protect human rights satisfyingly. Furthermore the EU legal order, as based on the rule of law, offers a level of protection that was considered to be sufficient.²⁷

The judgement of *Matthews* followed thereafter. This was one of the landmark cases where the ECtHR ruled on a Member State’s liability by implementing EU law.²⁸ The Court made an important distinction, while secondary law can be reviewed by the ECJ, primary law (the treaty articles) cannot. Hence, the ECtHR deemed it appropriate to have jurisdiction in order to monitor primary law, as the ECJ was not able to do so.²⁹ As a result one can conclude that the ECtHR could therefore review EU acts, if the individual was left without a remedy.³⁰ This rationale was also confirmed in³¹ *Cantoni*³², *Senator Lines*³³ and *Guerin*³⁴.

In the famous *Bosphorus* case³⁵, the ECtHR not only confirmed the rationale established in *Matthews* but also qualified it further. The case was about an alleged infringement of Bosphorus’ property right. The Irish authorities confiscated an aircraft leased to Bosphorus.

²¹ Waagstein, ‘Human Rights Protection in Europe’, *SPICE Digests*, Freeman Spogli Institute for International Studies, (2010); Besselink, ‘The European Union and the European Convention on Human Rights after the Lisbon Treaty: From Bosphorus Sovereign Immunity to Full Scrutiny?’ in A. Sabitha (ed.), *State Immunity: A Politico-Legal Study*, (The Icfai University Press, 2009), p. 179-196; App. No. 8030/77, CFDT vs. European Communities, DR 13 1978; App. No. 24833/94, *Matthews vs. UK* [1999] para. 32.

²² Margaritis, *Working paper No. 65*, (2011), p. 10.

²³ *M & Co v Federal Republic of Germany* (1990) 64 D.R. 138.

²⁴ ECtHR, *Matthews v. UK*, judgment of 18.2.1999.

²⁵ M. Breuer, ‘Offene Fragen im Verhältnis von EGMR und EuGH’ (2005) 32 EuGRZ, pp. 229–234; N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of selected EU Member States* (Europa Law Publishing, Groningen, 2004); *European Foreign Affairs Review* 11: 471–490, (2006), p. 483.

²⁶ See *M & Co v Federal Republic of Germany* (1990) 64 D.R. at para. 145, “[...]the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection”; para. 146, States do remain responsible, “regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations”

²⁷ Parga, ‘Bosphorus v Ireland and the protection of fundamental rights in Europe’, 31 *European Law Review* 2 (2006), p. 253.

²⁸ Ibid, p. 254; Margaritis, *Working paper No. 65* (2011), p. 11.

²⁹ Parga, 31 *European Law Review* 2 (2006), p. 254

³⁰ C. Tomuschat, ‘The International Responsibility of the European Union’ in E. Canizzaro (ed.), *The European Union as an Actor in International Relations*, Kluwer Law International, The Hague, (2002), p.190; Canor, ‘Primus Inter Pares. Who is the ultimate Guardian of Fundamental Rights in Europe’ (2000) 25 *European Law Review* 3, pp.17-18.

³¹ For an analysis of the following cases see P. Craig, G. de Burca, *EU Law. Texts, Cases and Materials*, p. 420-422; S. Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis’, *Common Market Law Review*, 43 (2006), n. 41; *European Foreign Affairs Review* 11: 471–490, (2006), p. 478-480.

³² ECtHR, *Cantoni v. France*, judgement of 15.11.1996.

³³ ECtHR, *Senator Lines v. 15 EU Member States*, judgement of 10.3.2004.

³⁴ ECtHR, *Guérin Automobiles v les 15 Etats de l’Union Européenne*, judgement of 4.7.2008.

³⁵ ECtHR, *Bosphorus Airways v. Ireland*, judgment of 30 June 2005.

They did so because of the EC Regulation 990/93 that was based on UNSC Resolution 820 (1993). At the bottom of the *Bosphorus* case lies an attempt to balance on the one hand side Member States' freedom and to give power to international organisations, on the other hand the necessity to secure the rights protected under the ECHR.³⁶

The test, also called 'equivalence test', applied by the ECtHR in order to determine whether there was a violation of the ECHR³⁷ can be summarised by the formula: $O + E = P$; 'where O stands for "obligation", E stands for "equivalence", and P stands for "presumption"'.³⁸ In other words, if a Member State is obliged under EU law to act in a certain way, and the human right protection are equivalent to those by the ECHR, then there is a presumption that the Member State has acted in accordance with the ECHR. This however can be rebutted if there is a 'manifest deficit'³⁹ in the protection of human rights.⁴⁰ The human rights protection shall be deemed equivalent if the protection is in fact 'comparable' as defined in the case.⁴¹

The test therefore permits a conditional rather than an unlimited review of Member State acts under the scope of EU law but nevertheless opens the door for indirect review of EU actions.⁴²

Overall the ECtHR held in its case law, that there are two instances where they will review EU law; firstly, if the issue arises out of EC primary law (*Metthews*) and secondly if the issue arises out of the Member States' implementation, given that they had no discretion in the matter (*Bosphorus*).⁴³ In cases where the Member State has discretion, they have to bear all responsibilities for the act.⁴⁴ Thus review is depending on whether the alleged infringement of fundamental rights can be tried by the ECJ or not.

2.3 The Critique About the "Equivalence test" and its Pitfalls

The equivalence test was not without critique. Already in the concurring opinion of Judge Ress the test was critically assessed, particularly in the light of a double standard as regards fundamental rights.⁴⁵ However, Judge Ress concluded that the test would in the end not lead to such double standard, primarily because the ECJ will need to take into consideration the ECHR case law in future cases.⁴⁶

Legal scholars have revealed that there are nevertheless several pitfalls or at least ambiguities as regards the test. Especially cases, where the ECJ has not been involved in, trigger great difficulties for the ECtHR. In a similar vein, the degree of discretion left to the

³⁶ Peers, *European Constitutional Law Review* 2 (2006), p. 451.

³⁷ Before the Court established the test it firstly considered the admissibility of claim, the Applicability and Proportionality of the EU act, for a summary of the judgment see O'Meara, 12 *German Law Journal* 10 (2011), p. 1255 – 1264.

³⁸ Peers, *European Constitutional Law Review* 2, (2006), p. 452.

³⁹ *Bosphorus*, para. 156.

⁴⁰ Peers, *European Constitutional Law Review* 2 (2006), p. 452; Parga, 31 *European Law Review* 2 (2006), p. 255.

⁴¹ *Bosphorus*, para. 155.

⁴² Peers, 2 *European Constitutional Law Review* (2006), p. 452; Parga, 31 *European Law Review* 2 (2006,) p. 259.

⁴³ Parga, 31 *European Law Review* 2 (2006), p.257.

⁴⁴ *Bosphorus*, para. 157: "It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations."; The Court relied on abundant case law on this point: inter alia, *Van de Hurk v Netherlands* (A/288): (1994) 18 E.H.R.R. 481; *Procola v Luxembourg* (A/326): (1996) 22 E.H.R.R. 193; *Cantoni v France*, R.J.D., 1996-V 1614; *Hornsby v Greece* (1997) 24 E.H.R.R. 250. It also pointed out that the ECJ's judgment in *Kondova* is consistent with this view: Case C-235/99, *R. v Secretary of State for the Home Department Ex p. Kondova* [2001] E.C.R. I-6427.

⁴⁵ See Concurring Opinion of Judge Ress in *Bosphorus* at §3; O'Meara, 12 *German Law Journal* 10 (2011) p. 1263.

⁴⁶ *Bosphorus*, at para. 3.

State that would negate the presumption of compliance has not been clearly determined. This could in the end lead to a need for interpretation of EU law, which is pursuant to *Foto-Frost*,⁴⁷ exclusively left to the ECJ. Thus any interpretation of EU law by the ECtHR would infringe the EU's legal autonomy – the very thing which the *Bosphorus Airways* judgment apparently seeks to avoid.⁴⁸ It was furthermore criticised that the EU could under the “*equivalence test*” be held liable for breaches of Human Rights without an adequate possibility to defend itself.⁴⁹ Additionally, the “*equivalence test*” puts the EU currently into a privileged position as regards the ECHR;⁵⁰ one that the ECtHR will arguably no longer be able to uphold once the EU has become a party to the ECHR.⁵¹

Finally, if alleged violations of fundamental right occurred outside any Member State's jurisdiction no responsibility can arise, even though the violation falls within Community law.⁵² This lacuna has already caused problems in the case of *Connolly*.⁵³

3. Review of EU acts under the Draft Accession Agreement

Once the EU has become a party to the ECHR, the current state of affairs as regards the review of EU acts by the ECtHR will change. From this moment onwards, direct claims can be brought against the EU before the Human Rights Court for violations of the ECHR.⁵⁴ This might imply on face value that the current indirect review mechanism will no longer be needed, however due to many technical as well as methodical obstacles, this conclusion must be drawn carefully.

Although the current state of affairs changes the obstacles that accompany EU accession to the ECHR are in fact still similar to the pitfalls found in the “*equivalence test*”. They can be structured into procedural and substantive topics. While former includes matters of co-respondent mechanism and prior involvement of the ECJ, latter primarily deals with the attempt to uphold the EU's legal autonomy. These matters are nevertheless overlapping and have consequences for both topics.

3.1. The Procedural Issues that Accompany ECtHR Review of EU acts

Both the co-respondent mechanism and internal review procedure have already been subject to major scholarly writing, especially former has been analysed in great detail and very complex as well as sophisticated mechanisms have been proposed.

⁴⁷ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] E.C.R. 4199.

⁴⁸ Peers, 2 *European Constitutional Law Review* (2006), p. 453.

⁴⁹ Margaritis, *Working paper No. 65* (2011) p. 13.

⁵⁰ Lock, ‘EU accession to ECHR: Implications for Judicial Review in Strasbourg’, *European Law Review* 6, (2010), p. 797.

⁵¹ Margaritis, *Working paper No. 65* (2011) p. 42; O'Meara, ‘“A More Secure Europe of Rights?” The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR’, 12 *German Law Journal* 10 (2011), p. 1828; Lock, ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’, *The Law and Practice of International Courts and Tribunals* 8, (2009).

⁵² Lock, ‘Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal order’, *Common Market Law Review* 48, (2011), p. 4-5

⁵³ *Connolly v 15 Member states of the European Union*, judgement of 9 December 2008; Lock, ‘EU Accession to the ECHR: Consequences for the European Court of Justice’, Paper for EUSA Conference, (2011), p. 6, available at: http://euce.org/eusa/2011/papers/1b_lock.pdf.

⁵⁴ Lock, Paper for EUSA Conference, (2011), p. 22.

The need to introduce devices such as the co-respondent mechanism is already enshrined in Article 1 (b) of Protocol No. 8.⁵⁵ Yet the ultimate rationale for its introduction lies in the attempt to start proceedings against the party, which was responsible for the (alleged) violation of fundamental right.⁵⁶ The current procedural remedies, in particular Article 36 (2) ECHR,⁵⁷ were deemed insufficient for this purpose, due to the fact that the “EU and its Member States are not totally autonomous from each other”,⁵⁸ and that such involvement has no binding effect for the joining party.⁵⁹ It should however not be neglected that the co-respondent mechanism is also an important tool to avoid interpretation of EU law by the ECtHR.⁶⁰ The introduction of this mechanism has been labelled as the “most important modification to the Convention”.⁶¹

It can be said that both adequate judicial protection and effective means of defence trigger the need for such mechanism.⁶² As of now, cases lodged against the EU directly have been declared inadmissible *ratio personae*,⁶³ a lacuna that can no longer be unsolved. Although direct claims against the EU can be brought before the ECHR post accession, this lacuna is closed, yet only unsatisfying. Particularly where a complaint is brought against a Member State, but it turns out that it was in fact the EU that caused the alleged violation, the individual should not be forced to start proceedings against the EU all over again.

The mechanism currently included in Article 3 of the Draft Accession Agreement is limited to cases that involve the Member States and the EU.⁶⁴ It should be born in mind that it was made very clear that the co-respondent mechanism is not a “procedural privilege” for the EU or its Member States.⁶⁵ The mechanism is one, which implies that the EU and its Member States share responsibilities before the ECHR,⁶⁶ for the purpose of a fair administration of justice.⁶⁷

There are in fact two different scenarios where the co-respondent mechanism could be used. Either the EU, or the Member State(s) become co-respondent to the case.⁶⁸ Both scenarios are addressed in Article 3 (2) and Article 3 (3) DAA, respectively.⁶⁹ One important feature of the co-respondent mechanism is its voluntary nature. This is to say that neither the EU nor

⁵⁵ The importance of compliance with this Protocol can also be seen by the fact that CDDH-UE (2011)16fin at para. 35 states: “The introduction of the co-respondent mechanism is also fully in line with Article 1.b of Protocol No. 8 to the Treaty of Lisbon.”

⁵⁶ Kralova, ‘Comments on the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’, *Czech Yearbook of International law* 2, (2011), p. 132; O’Meara, 12 *German Law Journal* 10, (2011), p. 1820; Lock, *Common Market Law Review* 48, (2011), p. 17; Jacqué, *Common Market Law Review* 48, (2011), p. 1014; CDDH-UE (2011)16fin para. 32.

⁵⁷ It is very important to distinguish the third party involvement from the co-respondent mechanism, see O’Meara, 12 *German Law Journal* 10 (2011), 1821; Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10; Remarkably also that CDDH-UE (2011)16fin at para. 40 states that third-party involvement could also be the more favourable mechanism and sometimes even the only admissible; for this also see O’Meara, 12 *German Law Journal* 10 (2011), p. 1821.

⁵⁸ In general Lock, *Common Market Law Review* 48, (2011), p. 18

⁵⁹ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10

⁶⁰ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10; Lock, *Common Market Law Review* 48, (2011), p. 19.

⁶¹ Kralova, *Czech Yearbook of International law* 2, (2011), p. 132.

⁶² Kralova, *Czech Yearbook of International law* 2, (2011), p. 132; Lock, *Common Market Law Review* 48, (2011), p. 17; Jacqué, *Common Market Law Review* 48 (2011), p. 1014.

⁶³ Kralova, *Czech Yearbook of International law* 2, (2011), p. 132; Lock, 35 *European Law Review* 6, (2010), p. 779; CDDH-UE (2011)16fin para. 37.

⁶⁴ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 11

⁶⁵ O’Meara, 12 *German Law Journal* 10 (2011), p. 1821

⁶⁶ Draft Accession Agreement commentary, para. 54; O’Meara, 12 *German Law Journal* 10 (2011), p. 1822; Jacqué, *Common Market Law Review* 48, (2011), p. 1014.

⁶⁷ O’Meara, 12 *German Law Journal* 10 (2011), p. 1821.

⁶⁸ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10.

⁶⁹ For a thorough analysis see Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10-13

the Member States are forced to join the proceedings.⁷⁰ In fact it can be said that the whole procedure from a substantial viewpoint is dependent upon the EU or the Member States and the ECtHR only decides whether the requirements to join the case are met, thereby staying officially in control of the proceedings.⁷¹ The reason for the voluntary nature of this mechanism is to prevent the ECtHR to assess whether a Member State has to join, since this would involve interpretation of EU law.⁷²

Apart from the co-respondent mechanism, prior involvement of the ECJ has been considered to be inevitable for a proper functioning of the judicial protection after the accession of the EU to the ECHR.⁷³ Although these two topics have first been considered individually, they are intrinsically connected,⁷⁴ as the issue only arises if the EU becomes a co-respondent under Article 3 (2) Draft Accession Agreement. Whilst this will be no issue if the individual has started proceedings against the EU directly,⁷⁵ the situation looks different if the issue has been raised before a national court. In those cases the ECJ can only be involved through the preliminary ruling under Article 267 TFEU, a procedure that is not necessarily used in every case. It could be argued that without the prior involvement of the ECJ, any case brought before the ECtHR by the individual shall be declared inadmissible since not all national remedies are exhausted pursuant to Article 35(2) ECHR. However based on the fact that the preliminary ruling is not a remedy for the individual but only a suggestion to the court,⁷⁶ it would be unjust to require an individual to exhaust this procedure before the case shall be declared admissible for the ECHR.⁷⁷ Consequential, cases could be brought before the ECHR without the ECJ having ruled on the matter. It should be noted that this would be rare as it is unlikely that a national court will not make such preliminary ruling.⁷⁸

Nevertheless, Article 3 (6) DAA has introduced a mechanism to ensure that the ECJ has the opportunity of prior involvement. The exact procedure for such 'prior involvement is still not clear',⁷⁹ however the possibility only arises if the EU has become a co-respondent.⁸⁰ As a result, if the EU refuses to do so, it has arguably waived its right of "prior involvement".⁸¹ In

⁷⁰ Jacqué, *Common Market Law Review* 48 (2011), p. 1015; Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 12.

⁷¹ Kralova, *Czech Yearbook of International law* 2, (2011), p. 139; Jacqué, *Common Market Law Review* 48, (2011), 1015; Discussion document between both European Courts, available at: http://www.ccbe.org/fileadmin/user_upload/document/Roundtable_2011_Luxembourg/Discussion_document_of_the_Court_of_Justice_of_the_European_Union_on_certain_aspects_of_the_accession_of_the_European_Union_to_the_European_Convention_for_the_Protection_of_Human_Rights_and_Fundamental_Freedoms_EN.pdf

⁷² The consequences of this voluntary nature will be addressed further down.

⁷³ In particular the infringement of the subsidiary principle of the ECHR was feared, Joint Communication from President Costa and Skouris, para 6, available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf; Jacqué, *Common Market Law Review* 48, (2011), p. 1018; Lock, 48 *Common Market Review*, p. 24.

⁷⁴ Kralova, *Czech Yearbook of International law* 2, (2011), p. 137, this is also apparent as both topics are discussed under Art. 3 DAA.

⁷⁵ In these circumstances, Art. 263 TFEU needs to be exhausted, see Lock, *Common Market Law Review* 48, (2011), p. 22-23.

⁷⁶ When a national court has to make this preliminary ruling have been developed in *Frost*, see Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] E.C.R. 4199, and *CILFIT*, Judgment of the Court of Justice, Case 283/81 (6 October 1982).

⁷⁷ Draft Accession Agreement, para. 57; Joint Communication from President Costa and Skouris see *supra* note 74, para. 6; O'Meara, 12 *German Law Journal* 10 (2011), p. 1824; Kralova, *Czech Yearbook of International law* 2, (2011), p. 137; Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 15.

⁷⁸ Joint Communication from President Costa and Skouris, para. 6; on the other hand since preliminary ruling are restricted to answering the question, the ECJ might not always have addressed the Convention right at issue see *Foundation Robert Schuman Policy Paper* (2011), p. 15.

⁷⁹ Lock, *Common Market Law Review* 48, (2011), p. 28; this however is done in order to protect the ECJ's procedural autonomy see Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 15.

⁸⁰ CDDH-UE (2011)16fin para. 58

⁸¹ Lock, *Common Market Law Review* 48, (2011).

any event, the ruling of the ECJ will not be binding upon the ECtHR,⁸² but only assess whether the individual has used the right legal basis for his or her contestation.⁸³

3.2 The Substantive Issues that Accompany EU Accession to the ECHR

Having scrutinized the procedural issues as regards ECtHR post-accession review of EU acts, it has become clear that they are all in the end linked to the maintenance of the EU legal autonomy or the compliance with Additional Protocol No. 8.⁸⁴

First and foremost the ECJ's monopoly in interpreting EU law has been much attention devoted to. Both the co-respondent and prior involvement mechanism have been established in such a way that the ECJ's competences remain untouched.⁸⁵

However the interpretative autonomy of the ECJ has not only been protected in the procedural issues. The Draft Accession Agreement clearly states that the ECtHR has no power in invalidating EU law but can only judge on the compliance with the ECHR.⁸⁶ Additionally Art. 5 of the Draft Accession Agreement ensures that Art. 344 TFEU and Art. 55 ECHR do not come into conflict by stating that proceedings before the ECJ are: "neither procedures of international investigation [...], nor means of dispute settlement [...]". Thereby the autonomy of the ECJ and the ECtHR are protected.⁸⁷

Another issue that has received much attention is the accession to the ECHR Protocols. As of today, only Protocol No. 1 and 6 have been acceded by all Member States,⁸⁸ and thus the EU will only accede these two pursuant to Art. 1 (1) DDA. The accession to other protocols is currently very unlikely, considering the resistance of England.⁸⁹

As regards the continuation of the "equivalence test", the Draft Accession Agreement is silent. It is up to the ECtHR therefore to rule on its application.⁹⁰ The likelihood of its continuation is debateable while some legal scholars suggest that in light of the caseload the test should be applied post-accession⁹¹ others are of the opinion that the privileged position of the EU will be unjust to maintain.⁹²

Finally, the ECJ has used at its starting point the Charter in about 30 cases since the entry into force of Lisbon. Thus both the ECJ and the ECtHR have stressed the importance of coherence between the Charter and the Convention.⁹³

Therefore on the one hand side the gaps found in the "equivalence test" were addressed while simultaneously compliance with Additional Protocol No 8 was paid utmost attention to. In particular the necessity to uphold the EU's legal autonomy and the preservation of EU competences, gives little room for the negotiators in finding solutions to these issues. As a result the solutions proposed are not all homogenous. The danger exists that these are largely

⁸² This however creates problems if the ECJ has found a violation of EU human rights, the question then arises whether the ECtHR should continue with the complaint or rule that is hence the alleged violation falls outside the ECHR see Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 16.

⁸³ CDDH-UE (2011)16fin para. 60; O'Meara, 12 *German Law Journal* 10 (2011), p. 1824.

⁸⁴ This protocol provides for rules governing the accession of the EU to the ECHR.

⁸⁵ See Lock, *Common Market Law Review* 48, (2011), p. 28; Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 15.

⁸⁶ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10; Kralova, *Czech Yearbook of International Law* 2, (2011), p. 140; Lock, *Common Market Law Review* 48, (2011), p. 13-15.

⁸⁷ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 10.

⁸⁸ Ibid, p. 9; CDDH-UE (2011)16fin para 16.

⁸⁹ Particularly in light of Art. 218 TFEU.

⁹⁰ Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 9.

⁹¹ Šaltinyte, 'European Union Accession to the European Convention on Human Rights: Stronger protection of Fundamental Rights in Europe?', 120 *Jurisprudence* 2, (2010), p. 193.

⁹² O'Meara, 12 *German Law Journal* 10, (2011), p. 1828; Groussot et. al., *Foundation Robert Schuman Policy Paper* (2011), p. 9; supra note 26 & 52.

⁹³ Discussion document between both European Courts, see supra note 72, para. 2.

influenced by political compromises and therefore do not lead to an improved protection of fundamental rights, the very purpose of EU accession.⁹⁴

4. The Consequences for Post-Accession Review of EU acts

4.1 The Pitfalls of the Proposed Solutions in the Draft Accession Agreement

As stated already the ambiguities of the “*equivalence test*” have to a large extent been addressed in the Draft Accession Agreement. In particular the possibility for the EU to defend itself before the ECHR has significantly improved through the co-respondent mechanism. The same is valid for the prior involvement of the ECJ in cases pending before the ECtHR. Also the lacunae as found in *Connolly* will be closed since EU can post-accession be directly reviewed by the ECtHR.⁹⁵

Although one might conclude that the accession leads to an enhanced mechanism for the review of EU acts and consequently to an improvement of fundamental rights protection, this conclusion requires scrutiny.

There are many factors that currently influence the negotiations between the EU and the ECHR, most of the times technical problems that were created by Protocol No 8. It is fair and just to state that the ultimate aim behind each proposed solution is the maintenance of the EU’s legal autonomy in order to comply with Additional Protocol No 8, yet even this has not been accomplished by now.

In particular the prior involvement of the EU still left the specific mechanism to be used open to debate.⁹⁶ Whilst this seems to be a minor obstacle, it leads in fact to major problems if one wants to incorporate such mechanism into existing EU law in order to prevent Treaty amendments.⁹⁷ Numerous mechanisms have been thought of, yet most of them seem either infringe the legal autonomy of the EU or appear unable to be incorporated into the current procedural mechanism of the EU. Nevertheless some solutions appear to be more appropriate than others. The first would be to use the Commission as the connector between ECJ and ECtHR.⁹⁸ The Commission could then through Art. 263 TFEU initiate the ECJ to rule on the matter.⁹⁹ The other possible solution would be to entrust this function to the advocate general.¹⁰⁰ Furthermore the ECtHR could also ask for a preliminary ruling, this however means that the ECJ’s answer needs to be binding.¹⁰¹ A final and maybe the most elegant solution would be to “strengthen the discipline of the preliminary reference procedure and

⁹⁴ Lock, 48 *Common Market Review*, p. 36.

⁹⁵ See in general Lock, *Common Market Law Review* 48, (2011), p. 22.

⁹⁶ Jacqu  , *Common Market Law Review* (2011), 1019; Lock, 48 *Common Market Review*, p. 29; as already pointed out in supra note 82 this is done in order to protect the procedural autonomy of the EU.

⁹⁷ Opinion 1/91 of the ECJ, neither may the ECtHR interpret EU law nor may the accession constitute a hidden treaty amendment, this means that the competences of the EU institutions may not be changed either.

⁹⁸ ECJ Judge Timmermans made that proposal at a hearing before the European Parliament, *L’adh  sion de l’Union Europ  enne    la Convention europ  enne des Droits de l’homme*, at a hearing before the European Parliament’s Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO>.

⁹⁹ Lock, *Common Market Law Review* 48, (2011), p. 29; Jacqu  , *Common Market Law Review* 48, (2011), p. 1021.

¹⁰⁰ Lock, *Common Market Law Review* 48, (2011), p. 30, for an in-depth analysis.

¹⁰¹ Jacqu  , *Common Market Law Review* 48 (2011), p. 1021, however the question still remains which procedure the Advocate General will then use.

¹⁰¹ Lock, Paper for EUSA Conference, (2011), p. 27; Opinion 1/91 of the European Court of Justice, para 61; This however is very unlikely to happen and was also excluded in CDDH-UE (2011)16fin para 60, as the assessment shall have no binding effect.

supplement the Foto-Frost case law”.¹⁰² It should be born in mind that all these procedures must take place before the ECtHR rules on the admissibility of the complaint, as this might already involve interpretation of EU law.¹⁰³ However as it is currently stated in the commentaries to the Draft Accession Agreement, such procedure would only take place before the merits of the application are decided,¹⁰⁴ this implies that the ECJ would only get involved after the complaint has been declared admissible.¹⁰⁵

In a similar vein, the co-respondent mechanism also lacks one major drawback. This is its voluntary nature. It is uncontested that if the applicant addresses his or her complaint to both the EU and the Member States, the respondent has no choice but to become co-respondents.¹⁰⁶ The situation however looks different if the complaint is only addressed to the EU and later on it is desired that one or more Member States join as co-respondent, and vice versa. In these circumstances it is up to the EU or its Member State whether they will join or not.¹⁰⁷

4.2 The Impacts on Review of EU Acts and Concluding Remarks

Thus the review EU acts by the ECtHR became from a theoretical viewpoint easier, since claims against the EU can be directly addressed. The mechanisms that are currently proposed in the Draft Accession Agreement have to a large extent solved the pitfalls of the “*equivalence test*”. These solutions however require very complex and partly ambiguous procedures, particular due to Additional Protocol No 8 that only left little room for manoeuvre to the negotiator of the Draft Accession Agreement.

Therefore it seems that the applicant’s interests are left out of the equation. Whilst the issue as revealed in *Connolly*¹⁰⁸ no longer exists, the new procedures are often not beneficial for the applicant. In particular, the already troublesome position of the applicant before the ECtHR is not improved with the introduction of the prior involvement mechanism; rather the opposite seems to be true.¹⁰⁹ It still remains unclear what happens if the ECJ finds the complaint to breach of EU law. Can the applicant after such finding still be considered to be a victim under the ECHR? It would look most reasonable to consider the applicant as a victim as long as the national authorities have not annulled the decision that affected him or her.¹¹⁰ In addition such mechanism will also not speed up the already lengthy proceedings, but result more likely than not in the opposite. Although this has been addressed in the commentaries to the Draft Accession Agreement, it remains an unsolved issue, even more so since the exact procedure has not yet been decided upon.

The second major drawback lies within the co-respondent mechanism. Issues might arise where the EU refuses to become a co-respondent to the case and the Member States refuse to accept responsibility because it actually lies with EU. Consequentially it has been suggested that in these circumstances such kind of reasoning should be denied. The future will tell whether this suggestion is followed. Nevertheless this issue implies that the rationale in

¹⁰² Jacqu , *Common Market Law Review* 48, (2011), p. 1019, however the ECJ does not merely want to trust its power of persuasion and has thus also opt for an introduction of such mechanism in Discussion document between both European Courts, see supra note 72.

¹⁰³ Jacqu , *Common Market Law Review* 48, (2011), p. 1021.

¹⁰⁴ CDDH-UE (2011)16fin, para. 58.

¹⁰⁵ Lock, *Common Market Law Review* 48, (2011), p. 28.

¹⁰⁶ Lock, *Common Market Law Review* 48, (2011), p. 18; see also Art. 3 (4) Draft Accession Agreement and CDDH-UE (2011)16fin para. 58 para. 49 – 52.

¹⁰⁷ see supra note 73.

¹⁰⁸ see supra note 53.

¹⁰⁹ European Trade Union Confederation.

¹¹⁰ Lock, *Common Market Law Review* 48, (2011), p. 35.

Matthews would need to be upheld,¹¹¹ and therefore the current mechanism would post-accession still exist as a fallback.

Hence it can be concluded that although the review of EU acts by the ECtHR will, from a theoretical viewpoint, become less problematic, the accession of the EU to the ECHR is not necessarily advantageous for the applicant. This is mainly because the new mechanism as a result of Protocol No 8 ought to be complex in order to safeguard the EU legal autonomy on the one side and the practical usefulness on the other. Thereby little room is left to the negotiators so that applicant's interest was largely neglected. What can be seen by the new mechanism is that the proposed procedures solve the currently unsettled position of the EU and its Member States in proceedings before the ECHR. The new procedures have, however, created new problems for the applicant, as outlined above.

It can thus be stated that review of EU acts by the ECtHR will change post-accession. These changes appear to be advantageous for the EU and its Member States, but not for the applicant.¹¹² This is particularly worrying since both EU institutions "advertise" the accession as an improvement for fundamental right protection. Whether this is true seems currently to be more than questionable. One can therefore only hope that in future negotiations, the Council of Europe and the EU will be more focused on the applicant's interest, if both intend not only to advertise an improved protection of fundamental rights in Europe but also to act upon it.

¹¹¹ Ibid, p. 19.

¹¹² It should be noted that the impacts of these changes for the ECtHR are not considered in this paper, but it can be shortly said that they currently do not seem to be entirely advantageous either, for further information see also Foundation Robert Schuman Policy Paper (2011).



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